No. 02-695-CSX Title: Michael Fitzgerald, Treasurer of Iowa, Petitioner
v.
Racing Association of Central Iowa, et al.

Docketed: November 7, 2002 Court: Supreme Court of Iowa

Entry	Date	Proceedings and Orders
	Nov 4 2002	Petition for writ of certiorari filed. (Response due December 7, 2002)
	Dec 6 2002	Brief amici curiae of City of Bettendorf, Iowa and City of Davenport, Iowa filed.
	Dec 9 2002	Brief of respondents Racing Association of Central IA, et al. in opposition filed.
	Dec 20 2002	Reply brief of petitioner Michael Fitzgerald, Treasurer of Iowa filed.
	Dec 24 2002	DISTRIBUTED for Conference of January 10, 2003
	Jan 13 2003	REDISTRIBUTED for Conference of January 17, 2003
	Jan 17 2003	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 3, 2003. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 2, 2003. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 21, 2003. Rule 29.2 does not apply. SET FOR ARGUMENT April 29, 2003. **********
	Feb 27 2003	Brief amicus curiae of United States filed.
	Mar 3 2003	Joint appendix filed.
	Mar 3 2003	Brief of petitioner Michael Fitzgerald, Treasurer, Iowa filed.
	Mar 3 2003	Brief amici curiae of City of Bettendorf, Iowa, et al. filed.
	Mar 3 2003	Brief amici curiae of Missouri, et al. filed.
	Mar 3 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 11 2003	Record filed.
	Mar 13 2003	CIRCULATED.
	Mar 20 2003	Record filed.
	Apr 2 2003	Brief of respondents Racing Association of Central Iowa, Inc., et al. filed.
	Apr 2 2003	Brief amicus curiae of Polk County, Iowa filed.
	Apr 2 2003	Brief amicus curiae of Institute for Justice filed.
	Apr 2 2003	Brief amicus curiae of City of Dubuque, Iowa filed.
	Apr 18 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 21 2003	Reply brief of petitioner Michael Fitzgerald, Treasurer, IA filed.
	Apr 29 2003	ARGUED.

Supreme Court, U.S.
FILED

No. _____ 02 695 NOV 4 2002

OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL FITZGERALD,
Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the State of Iowa tax the revenue from slot machines at parimutuel racetracks and the revenue from all casino games on riverboats, including slot machines, at different rates without violating the Equal Protection Clause?

PARTIES

Petitioner is Michael Fitzgerald, Treasurer of the State of Iowa, an elected official of the State of Iowa. No corporate disclosure statement is required of Petitioner.

Respondents are the Racing Association of Central Iowa, the Dubuque Racing Association, Ltd., the Iowa West Racing Association and the Iowa Greyhound Association, and are Iowa non-profit corporations.

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LOWER COURT DECISIONS

The Iowa District Court in and for Polk County entered its Ruling on Defendant's Motion to Strike, Defendant's Motion for Summary Judgment, and Plaintiffs' Cross-Motion for Summary Judgment on December 4, 2000, in Case No. CE 36601. (App. 20-41).

On June 12, 2002, the Iowa Supreme Court issued the opinion for which review is sought, *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d 555 (Iowa 2002). (App. 1-19). On August 6, 2002, the Iowa Supreme Court denied the State's Request for Rehearing. The Iowa Supreme Court *sua sponte* amended its decision on September 6, 2002. (App. 44-47).

JURISDICTION OF THE COURT

The Iowa Supreme Court held that a state statute establishing different tax rates for the revenue from slot machines at parimutuel racetracks and for the revenue from all casino games on riverboats, including slot machines, has no rational basis and, therefore, violates the Equal Protection Clause. The Supreme Court's decision constituted a final decision on the issue of the State's liability. The Court remanded the case to the Iowa District Court for a determination of appropriate relief.

There are no other federal issues to be decided in this case and the Iowa Supreme Court's opinion is a final judgment for purposes of this Petition. *See Cox Broadcasting v. Cohn,* 420 U.S. 469, 478-80 (1975). There is no adequate and independent state ground for the holding in this case. *See Michigan v. Long*, 463 U.S. 1032 (1983).

The State's petition for rehearing was denied on August 6, 2002.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. United States Constitution, Amendment 14, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. Iowa Constitution, Article I, Section 6.

> All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

III. 42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

IV. Iowa Code § 99F.11

> A tax is imposed on the adjusted gross receipts received annually from gambling games authorized by the chapter at a rate of five percent on the first one million dollars of adjusted gross receipts, at a rate of ten percent on the next two million dollars of adjusted gross receipts, and at a rate of twenty percent on any amount of adjusted gross receipts over three million dollars. However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetrack enclosures is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is thirty-six percent. The taxes imposed by this section shall be paid by the licensee to the treasurer of the state within ten days after the close of the day when the wagers were made and shall be distributed as follows. . . .

STATEMENT OF THE CASE

In this action three Iowa racetracks sued the Treasurer of the State of Iowa pursuant to 42 U.S.C. §§ 1983 and 1988, the Fourteenth Amendment to the United States Constitution and Article I, § 6[1] and Article III, § 30[2] of the Iowa Constitution challenging the constitutionality of a portion of the State's wagering tax. The racetracks sought injunctive relief against the state tax statute establishing the wagering tax rate and sought a refund of all wagering taxes paid from 1997 which were higher than the wagering taxes paid by riverboats – more than 100 million dollars. (App. 48-51). The Iowa Supreme Court resolved this case under the Equal Protection Clause of the United States Constitution and the Iowa Constitution[3] but did not decide this case on an independent state ground. *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 562. The Defendant seeks certiorari because the decision establishes a new Equal Protection standard that conflicts with Supreme Court precedent and will subject the State to challenges of other tax classifications, as well as claims of more than $100 million in refunds in this case.

[1] Article I, § 6, is the state constitutional analog to the Equal Protection Clause of the United States Constitution.

[2] Article III, § 30, of the Iowa Constitution prohibits local or special laws.

[3] Although the Equal Protection and the Fourteenth Amendment claims apply the same standard and would have been decided in the same manner, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n. 12 (1981), the Iowa Supreme Court decided the case only under the Equal Protection Clause. *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d at 562.

Federal and State Equal Protection Clauses: Interwoven Law

The Iowa Supreme Court based its decision on a unified analysis of the Equal Protection Clause under the federal and state constitutions. The decision is not based on adequate and independent state ground which would deprive this Court of jurisdiction. In assessing whether adequate and independent state ground exists, this Court assumes "there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Michigan v. Long*, 463 U.S. at 1042. Under these circumstances this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so." *Id.* at 1040-41.

Nothing in the current decision departs from this stance. The Iowa Supreme Court reiterated that it would apply the "same analysis"[4] in considering the federal and

[4] The Iowa Supreme Court has repeatedly applied the same analysis to decide constitutional issues under the Equal Protection Clause of both the federal and state constitution. *See, e.g., Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002) ("We usually deem the federal and state equal protection clauses to be identical in scope, import, and purpose. We therefore apply the same analysis in considering state equal protection claims as we do in considering federal equal protection claims under the Fourteenth Amendment to the Federal Constitution." (citation omitted)); *Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Products, Inc.*, 522 N.W.2d 607, 614 (Iowa 1994) ("In equal protection challenges based on the federal and Iowa Constitutions, we usually interpret both federal and state equal protection provisions the same."); *Rudolph v. Iowa*

(Continued on following page)

state Equal Protection claims. *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 558. When making the pivotal assessment whether a rational basis supports the statute the Court relied on federal, not state, case law. *Id.* at 560-61. The holding that the statute violates both federal and state Equal Protection Clauses is stated without any analytical distinction between the two constitutional provisions. *Id.* at 562. This holding does not present a jurisdictional barrier for this Court.

Taxation of Gambling Games at Racetracks and on Riverboats

Parimutuel wagering at racetracks and casino gambling at riverboats originated from separate legislative acts for distinct purposes and thus had distinct and contrasting histories. Parimutuel wagering on horse and dog races was first authorized in Iowa in 1983. (App. 59). The purpose of the racetrack legislation was, in part, to promote the development of agricultural industries. (App. 67). At the time, betting on horse and dog races was the only gambling permitted at racetracks. (App. 59).

In contrast, casino gambling on riverboats was first authorized by the legislature in Iowa in 1989. (App. 62). The riverboat gambling statute permitted traditional forms of casino-style gambling to be conducted on riverboats in such a fashion so as to replicate Iowa's riverboat

Methodist Medical Center, 293 N.W.2d 550, 557 (Iowa 1980) ("We apply the same test under the federal and state constitutions.").

heritage and promote development in Iowa river communities along the historic Mississippi and Missouri Rivers. (App. 63, 67).

Prior to 1994, Iowa had adopted two separate wagering tax statutes: one for the revenue from parimutuel wagering at racetracks and one for the revenue from casino games on riverboats. *See* Iowa Code §§ 99D.15, 99F.11. The highest wagering tax on the revenue from gambling on horse or dog races was 6 percent. *See* Iowa Code § 99D.15 (2001).[5] The highest wagering tax on the revenue from gambling at riverboat casinos was 20 percent. Iowa Code § 99F.11 (2001).[6] All forms of gambling, e.g. slot machines, blackjack, craps, roulette, on riverboats were taxed at the same rate.

By 1994, both industries had encountered economic difficulties, albeit for different reasons. The Iowa riverboat casino industry faced competition from other states because Iowa imposed strict betting limits of $5.00 per bet, and loss limits of $200.00 per person per riverboat "excursion" which other states did not impose. Iowa Code §§ 99F.9(2), 99F.9(7) (1993). As a result of the strict statutory scheme, Iowa lost three of six riverboat businesses to other states with more favorable laws. (App. 65-66).

In 1994, in response to the problems faced by each industry and a lengthy gambling study commissioned by Iowa's Governor, the legislature adopted a number of amendments to the parimutuel racing and riverboat

[5] The parimutuel waging tax has not changed since 1994.

[6] The wagering tax provision for riverboat casinos has not significantly changed since 1994.

casino statutes. To benefit the riverboat industry, the legislature rescinded betting and loss limits and eliminated other restrictions. 1994 Iowa Acts ch. 1021. To benefit the racetrack industry, the legislature authorized the racetracks to operate slot machines to raise additional revenue.[7] This amendment was particularly significant because, at that time, Iowa was the only state in the country that permitted slot machines at racetracks.

At the same time, the legislature set a wagering tax rate on the revenue from the gambling games at the racetracks. *See* Iowa Code § 99F.11. Iowa law created a graduated tax rate on adjusted gross receipts over three million dollars which began at 20 percent in 1994. In 1997 the tax rate increased by 2 percent per year and would have reached 36 percent in 2004. *Id.* During the same period from 1997 to 2004, the tax rate on gambling games on riverboats has been and would have remained at 20 percent. Significantly, the legislature did not amend other tax laws which benefitted only the racetracks.[8]

Proceedings in the Iowa Courts

On December 4, 2000, the District Court dismissed the action in its entirety pursuant to the State's motion for summary judgment. (App. 40). The District Court applied

[7] The legislature did not grant racetracks the authority to operate table gambling games, such as blackjack or craps, or video games of chance. Iowa Code §§ 99F.4A, 99F.1(9) (2001).

[8] Iowa statutes, for example, provide horse racetracks (but not riverboats) with a tax credit of up to five percent of the gross sum wagered per year to be used for debt retirement or operating expenses. Iowa Code § 99D.15(2) (2001).

United States Supreme Court precedent and found at least three conceivable rational bases for the different tax rates: 1) the legislature wanted to promote development of river communities, 2) the legislature wanted to promote Iowa's riverboat history, and 3) the legislature deemed riverboat casinos to be a needed or useful industry. (App. 34).

The Iowa Supreme Court, in a 4-3 decision, reversed the District Court and declared the tax unconstitutional pursuant to the Equal Protection Clause. (App. 15-16). Departing from well established legal precedent, the Iowa Court first made the erroneous conclusion that the sole reason behind the 1994 amendments was to financially benefit the racetracks. (App. 10-11, 13-14). The Court then dismissed each conceivable rational basis behind the tax provision, because the Court found that they were not the real reason behind the amendments. (App. 14-15). Recasting the rational basis test, the Iowa Court further held that the higher tax does not serve the purpose of the 1994 amendments to financially benefit the racetracks. (App. 13-14). The Iowa Court erroneously considered facts that arose several years after the adoption of the statute to justify its findings regarding legislative intent and the impact that the tax would have on the racetracks. (App. 8-9, 12-13).

The three justices in the dissent found a number of rational bases behind the distinction between the wagering tax rates. (App. 17-19). As stated in the dissent, "[r]iverboats are not the same as racetracks" – one speaks to "river lore" while the other speaks to agriculture. (App. 18). The dissent followed this Court's precedent and concluded:

> we might think that the tracks should enjoy a more competitive playing field or that gambling is a bad idea all the way around. But our views on the matter are irrelevant. Our concern is limited to finding a rational basis for the taxing scheme that passes constitutional muster.

(App. 18-19).

Adverse Impact of the State Supreme Court Decision

The decision by the Iowa Supreme Court will have an enormous impact in Iowa both financially and in future litigation. The State is faced with over $100 million dollars in tax refunds to the three racetracks during difficult fiscal times. Misplaced emphasis on fact finding in the Court's decision will reshape the manner in which constitutional claims are litigated in Iowa. Already, one Iowa district court has applied the decision to reject a motion to dismiss a challenge to the State's local option sales tax statute under the Equal Protection Clause apparently because the challenge should be measured by evidence rather than rational speculation. *See Coalition for a Common Cents Solution v. State*, No. EQCV26737 (October 8, 2002) ("[T]he statute does not set out the legislative basis for the local option sales tax. It would be pure speculation on the part of this Court to make such a determination at this stage in the proceedings."). (App. 75-76). A successful challenge to the local option sales tax statute would create serious impediments to Iowa's system of taxation to support school infrastructure projects. (*See* App. 72). Review of the Iowa Supreme Court's decision by this Court is critical to restoration of the rational basis test and to prevent further damage to Iowa's tax system.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

THE IOWA SUPREME COURT INTERPRETED THE EQUAL PROTECTION CLAUSE IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT AND THAT WILL CAUSE THE STATE OF IOWA IRREPARABLE DAMAGE AS PRECEDENT IN FUTURE CASES.

In a 4-3 split decision the Iowa Supreme Court struck down a state tax statute under the Equal Protection Clause and directed that the Iowa General Assembly "must tax racetracks and riverboats equally at a rate they both can bear." *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d at 562. (App. 14). The Court dismissed all conceivable rational bases that support the tax statute and relied on fact finding to substitute the Court's judgment for the legislative determination that revenue from slot machines at racetracks and revenues from all casino games on riverboats should be taxed at a different rate. The Equal Protection standard announced by the Court deviates from established legal precedent thereby creating compelling grounds to grant this Petition for Certiorari.

A. Equal Protection analysis required the Iowa Supreme Court to uphold the statute if there were any conceivable rational basis to support different tax rates.

Precedent from this Court clearly establishes that the Equal Protection Clause "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose

or rationale supporting its classification . . ." but only that ". . . a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). Indeed, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). The rational basis test is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.*

This Court has "repeatedly held that a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Central State University v. American Association of University Professors,* 526 U.S. 124, 127-28 (1999). When crafting tax statutes in particular, the States have "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Nordlinger v. Hahn*, 505 U.S. at 11, *quoting from Williams v. Vermont*, 472 U.S. 14, 22 (1985). "Time and again . . . this Court has made clear in the rational-basis context that the 'Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" *Nordlinger v. Hahn*, 505 U.S. at 17-18, *quoting from Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted).

Despite the plain instruction these cases provide for analysis of statutes under the Equal Protection Clause,

the Iowa Supreme Court flatly rejected the rational basis the district court relied upon,[9] rejected the rational basis argued by the State[10] and declined to apply rational speculation to establish a basis for the tax differential. The Court swept aside any further considerations without explanation save only that "[t]he State made other contentions not accepted by the trial court. We likewise find them unconvincing." *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 562. (App. 14).

Nordlinger

The Iowa Supreme Court's summary rejection of a rational basis to sustain the wagering tax statute stands in stark conflict with the Equal Protection analysis of state tax laws undertaken by this Court in *Nordlinger v. Hahn*. When a property tax system created disparity between newer and older property owners due to the basis on which their property was assessed which resulted in older owners paying progressively less in property taxes than newer owners of comparable property, this Court had "no difficulty in ascertaining at least two rational or reasonable considerations" to support the difference. Neighborhood preservation and protection of a reliance

[9] The district court concluded that promoting development of river towns, or fostering riverboats in order to preserve riverboat history, or promoting riverboats as a useful industry would constitute a legitimate state interest to support the higher tax on revenue from casino games on riverboats. (App. 34).

[10] The State argued, *inter alia*, that a lower tax rate on revenue from casino games on riverboats could prevent boats from leaving the State or could offset higher expenses for operating a riverboat as opposed to operating a racetrack. (App. 54-55).

interest among older property owners were sufficient to satisfy the Equal Protection Clause. *Id.* at 11-13. When analyzing the Iowa tax statute, the Iowa Supreme Court, by contrast, failed to engage in rational speculation and relied on fact finding to evaluate the legislative purpose behind the statute in order to substitute its own judgment for that of the legislature.

B. The Iowa Supreme Court's fact finding regarding the legislative purpose and the financial impact of the tax on racetracks is directly contrary to this Court's precedent and will result in extensive fact finding trials in equal protection cases.

An analysis of state statutes under the Equal Protection Clause is no occasion for fact finding. The law is well-settled that a legislature is not required "to articulate reasons for enacting a statute" and, therefore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis. In other words, a Legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) (citations omitted). "Only by faithful adherence to this guiding principle . . . is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Lehnhausen v. Lake Short Auto Parts*, 410 U.S. 356, 365 (1973).

Central State University

This Court has summarily reversed a state supreme court for such factual forays into the record. In *Central State University v. American Association of University Professors*, 526 U.S. 124 (1999), this Court summarily reversed a decision of the Ohio Supreme Court that established a standard conflicting with the rational basis test set by the United States Supreme Court. The Ohio Court, like the Iowa Court in this case, had erroneously looked to evidence in the record to determine whether a statute was supported by a rational basis. *See Id.* 526 U.S. at 126-127.

Like the Ohio Supreme Court in *Central State University,* the Iowa Supreme Court disregarded the prohibition against courtroom fact finding under a rational basis test. The Court makes factual findings regarding: a) the amount of money the racetracks and riverboats have made from slot machines; b) the proportion of money each made from slot machines versus other sources of income; c) the amount of tax that the tracks are expected to pay in future years; and d) the amount of charitable distributions made by the racetracks. *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 559-61. (App. 8-13).

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Rational Basis as a Factual Foray

The Iowa Court impermissibly draws factual conclusions regarding the harm that the wagering tax causes the racetracks.

- the tax rates give "riverboats a competitive advantage over racetracks." *Id.* at 561 (App. 12);

– the tax "makes it difficult, if not impossible, for the racetracks to continue to make societal contributions." *Id.* (App. 12);

– the "taxing scheme frustrates the racetracks' ability to contribute to the overall economy of this state." *Id.* (App. 13);

– the rates "will seriously jeopardize the racetracks' viability." *Id.* (App. 13);

– the "tax frustrates the legislative purpose in permitting racetracks to operate." *Id.* at 562 (App. 15);

– the tax rates are "disabling an industry it was allegedly designed to aid." *Id.* (App. 15).

Particularly troubling is the Iowa Court's reliance on facts that occurred *after* the statute was enacted in 1994. The Court makes findings regarding the adjusted gross revenue of both racetracks and riverboats in 1998 through 1999. *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d at 559. (App. 8, 9, 12). The Court makes findings regarding the amount of taxes the tracks will pay in 1999-2002. *Id.* at 560-61. (App. 12). The Court makes findings as to the amount of charitable payments the horse racetrack will be able to make in 2003. (App. 12-13). This financial data – facts not known nor foreseeable by the legislature when it adopted the amendments to the tax statute in 1994 – are not relevant to whether there is a rational basis for taxing revenue from gambling games at racetracks and riverboats at different rates.

The Iowa Court simply substituted its own judgment for the legislative policy decision to tax the revenue from slot machines at racetracks higher than the revenue of casino games on riverboats. However, a legislature has

never been required to submit evidence in a courtroom setting to prove its judgment was ultimately correct. *See Vance v. Bradley*, 440 U.S. 93, 111 (1979). As this Court has stated, the "problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Heller v. Doe*, 509 U.S. at 320, *quoting from Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913).

The Iowa Supreme Court's use of post-legislative facts raises a disturbing question that flies in the face of all United States Supreme Court precedent: Can a constitutional statute become unconstitutional based on facts that occur after its passage? If the present case had been filed and litigated in 1995, many of the court's underlying factual findings would not exist, thus eliminating the Iowa Court's justification for finding the statute unconstitutional. Would the Iowa Supreme Court then find the statute constitutional? The constitutionality of a statute should not turn on events occurring over the passage of time.

The Iowa Supreme Court's decision will turn Equal Protection issues from matters decided on motions into full-blown trials and will create a new standard that is directly contrary to the standards set forth by this Court. *See Vance*, 440 U.S. at 111. The decision sets the parties on an evidentiary track requiring the parties to come out of the gate putting on post-enactment evidence to show the eventual impact of a law.

Iowa is already seeing the repercussions of this decision as it is applied by the district courts in other cases. In *Coalition for a Common Cents Solution v. State*, No. EQCV26737 (October 8, 2002), the District Court cited to this decision in determining that it could not speculate

as to the legislative bases for the statute. (App. 71-76). Of course, under the Supreme Court's rational basis analysis, that is precisely what the District Court must do.

Judicial Oversight: Second Guessing Legislative Tax Policy

The Iowa Supreme Court opinion abandoned the Supreme Court's rational basis test by relying heavily on the adverse impact of the tax on the racetracks and by focusing on the source of the revenue subject to taxation. The rational basis analysis does not empower the judiciary to sit as a "superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas which neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (*per curiam*). Courts must not pass on the reasonableness of a tax by assessing its impact on a particular business. *City of Pittsburgh v. Alco Parking Corp. et al.*, 417 U.S. 369 (1974). This is true even when the impact of a tax may be to destroy a particular business. *Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *see also Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 358 (1973).

Contrary to established precedent, the Iowa Supreme Court ultimately made a policy decision that the wagering tax statute must be struck because of the impact of the tax rate on racetracks. For example, the Iowa Court stated that "[i]f the legislature wants to increase state revenue, then it must tax racetracks and riverboats equally at a rate they can both bear." (App. 14). Until now, the traditional rational basis standard has never included judicial directives to the legislature on setting tax rates.

The Iowa Supreme Court strayed into concerns that are matters of legislative, not judicial, prerogative. For example, the Court found that the tax rate "frustrates the racetrack's responsibility to distribute money to local government and charitable organizations" and "frustrates the racetrack's ability to contribute to the overall economy of this state" and may end up "helping the riverboat industry" by hurting the racetrack industry. (App. 12, 13, 14). Yet the legislature could set the tax rate on racetracks and riverboats equally at 30, 40 or even 50 percent and not remedy the concerns expressed by the Court.

The Iowa Supreme Court also deviates from this Court's rational basis test by focusing on the activity rather than the taxpayer. The Court found that:

> in reality the essence of the differential treatment is not rooted in the dissimilar scenery surrounding the main activity at both facilities. Rather, the heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d at 558-59. (App. 8).

The Iowa Supreme Court's focus on the activity as opposed to the taxpayer will unduly complicate the rational basis test analysis by requiring a "look back" at every sales transaction. For example, corn grown, harvested and sold by a family farmer may be taxed differently than corn grown, harvested and sold by a corporation. *See, e.g., Lehnhausen*, 410 U.S. at 360 (taxing personal property held by corporations but not personal

property held by individuals). Likewise, hamburgers may be prepared and sold at state and county fairs in the same manner that McDonald's prepares and sells hamburgers, yet the two enterprises are taxed differently. Even the Iowa Supreme Court has previously found that a sales tax may be imposed upon news-oriented magazines, but not newspapers, without violating Equal Protection. *Hearst Corp. v. Iowa Dep't of Revenue and Finance,* 461 N.W.2d 295, 306 (Iowa 1990), *cert. denied,* 499 U.S. 983, 111 S. Ct. 1639, 113 L. Ed. 2d 735 (1991).

The Iowa Supreme Court has turned away from the rational basis test and thrust the Court into the position of adjudicating tax policy. This Court should grant this petition, as it did in *Central State University*, and reverse the Iowa Supreme Court consistent with United States Supreme Court precedent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 54/01-0011

Filed June 12, 2002

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Appellants,

vs.

MICHAEL FITZGERALD, TREASURER, STATE OF IOWA

Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Opponents of a tax on racetracks appeal the district court's order granting summary judgment to the Treasurer of the State of Iowa on their constitutional equal protection claim, and the State cross-appeals on the court's denial of its motion for summary judgment. **REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Mark McCormick, Thomas L. Flynn, and Edward M. Mansfield of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, for appellant Racing Association of Central Iowa.

Gerald Crawford and Brad Schroeder of The Crawford Law Firm, Des Moines, for appellant Iowa Greyhound Association.

Stephen C. Krumpe of O'Connor & Thomas, P.C., Dubuque, for appellant Dubuque Racing Association, Inc.

Lawrence P. McLellan of Sullivan & Ward, P.C., Des Moines, for appellant Iowa West Racing Association.

Thomas J. Miller, Attorney General, and Jeffrey D. Farrell and Jean M. Davis, Assistant Attorneys General, for appellee.

STREIT, Justice.

Iowa racetracks challenge legislation that significantly increased the tax on racetracks, but not on riverboats. The district court upheld the unequal taxing scheme finding the state has a legitimate interest in promoting the riverboat industry and the economy of river towns. Because we find no rational basis exists for this differential tax treatment, we reverse and remand.

I. Background and Facts

The Racing Association of Central Iowa operates Prairie Meadows Racetrack and Casino in Altoona, Iowa. Dubuque Racing Association and Iowa West Racing Association operate racetracks in Dubuque and Council Bluffs, Iowa, respectively. Iowa Greyhound Association is an organization of greyhound owners that races at Dubuque Greyhound Park in Dubuque and at Bluffs Run in Council

Bluffs.[1] The Racetracks sued the Treasurer of the State of Iowa (the "State"), asserting the wagering tax rate on racetracks is a violation of their equal protection rights under both the Federal Constitution and the Iowa Constitution.

Iowa authorizes two types of gambling establishments. Appellants are members of the first class of establishment – the racetrack – and are authorized by statute to conduct two types of gambling. They may engage in wagering on dog or horse races pursuant to Iowa Code section 99D.11 (1999). Racetracks accept wagers on live races at the track or on simultaneous telecast races approved by the Iowa Racing and Gaming Commission. Racetracks may operate slot machines, but they may not operate other games of chance or video machines. Iowa Code § 99F.1(9).

The second type of gambling establishment is excursion gambling boats ("riverboats"). Riverboats may not offer wagering on dog or horse races, but may offer a larger variety of other gambling games, including table games, video machines, and slots. *Id.*

The issue in this case centers around the differential tax rate based on gross receipts generated at racetracks and riverboats. In 1994, the Iowa legislature enacted legislation designed to alleviate the stress put on the Iowa riverboat and racetrack industries, as both were losing significant revenue. This legislation permitted racetracks to operate slot machines and eliminated the wager and

[1] All of the plaintiffs shall be referred to hereinafter as the "Racetracks."

loss limits to assist in increasing revenue. Iowa Code §§ 99F.4A, 99F.2. Finally, the legislature adopted a higher wagering tax rate on racetracks. Iowa Code § 99F.11(1).

> The riverboats are taxed
>
> > at the rate of five percent on the first one million dollars of adjusted gross receipts, at the rate of ten percent on the next two million dollars of adjusted gross receipts, and at the rate of twenty percent on any amount of adjusted gross receipts over three million dollars.

Id. § 99F.11. The tax rate for racetracks is considerably higher than for riverboats.[2] Beginning on January 1, 1997, the legislature set a rate of twenty-two percent on adjusted gross receipts over three million dollars from gambling games at racetracks. *Id.* This rate was set to increase by two percent each calendar year until the rate reaches thirty-six percent. *Id.* Racetracks are currently being taxed at thirty-two percent.

The Racetracks filed a petition in equity challenging the constitutionality of the differential tax imposed on racetracks. Specifically, they argue the taxing statute violates the equal protection clauses of the state the federal constitutions. The State filed a motion for summary judgment and the Racetracks filed a cross-motion for summary judgment. The district court denied the Racetracks' cross-motion for summary judgment concluding

[2] A state representative from a riverboat county offered the original proposed amendment, H-5391 which proposed a forty percent gross-receipts tax on gambling games at racetracks. There was no stated reason for imposing the higher tax rate on racetracks.

they failed to negate every conceivable basis for upholding the taxing statute. Because the court found a rational basis upon which to uphold the constitutionality of the statute, it granted this part of the State's motion for summary judgment. However, it denied the State's motion asserting the court did not have authority to grant injunctive relief because it is not vested with power to determine the appropriate tax rate. The Racetracks appeal and the State cross-appeals on these adverse rulings.

II. Scope of Review

We review the grant or denial of a motion for summary judgment for correction of errors at law. *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 202 (Iowa 2002) (citations omitted). Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3) (2002). The party moving for summary judgment must show no genuine issues of material fact exist. *Wright v. Am. Cyanamid Co.*, 599 N.W.2d 668, 670 (Iowa 1999). We will view the record in the light most favorable to the non-moving party. *Kelly v. Iowa Mut. Auto. Ins. Co.*, 620 N.W.2d 637, 641 (Iowa 2000).

III. The Merits

The Racetracks argue the trial court erred in holding the tax statute was constitutional. They argue the justifications given by the State and the district court in support of the statute do not satisfy the rational basis test. The State responds arguing racetracks and riverboats are

dissimilar classes of activities which may be treated differently. However, if we find they are members of the same class, the State contends there is a legitimate state interest in treating racetracks differently than riverboats. In any event, the State argues the court is without authority to set the tax rate so it may not grant injunctive relief. We address each of these arguments in turn.

A. Constitutionality of the Tax Statute

The Racetracks argue the thirty-six percent tax imposed in Iowa Code section 99F.11 is unique, discriminatory, and confiscatory. In so arguing, the Racetracks cite the Equal Protection Clauses of both the federal and state constitutions. Before we begin our analysis of this issue, we briefly address the significance of invoking both the state and federal constitutions.

The federal Equal Protection Clause prohibits states from "deny[ing] . . . any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, §1. The state Equal Protection Clause prohibits laws that "grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6. We have said Iowa courts are to "apply the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim." *In re Morrow,* 616 N.W.2d 544, 547 (Iowa 2000) (quoting *State v. Ceaser,* 585 N.W.2d 192, 196 (Iowa 1998)). With this principle in mind, we turn to the Racetracks' equal protection argument.

We begin our discussion with the presumption Iowa Code section 99F.11 is constitutional. *State v. Keene,* 629 N.W.2d 360, 364 (Iowa 2001). The Racetracks have a

heavy burden of proving beyond a reasonable doubt the statute is unconstitutional. *Id.* Specifically to overcome the presumption of legislative constitutionality, they must negate every reasonable basis upon which to uphold the statute. *Id.* We have said before the legislature acts with broad authority in the realm of taxation. *Hearst Corp. v. Iowa Dep't of Revenue & Fin.,* 461 N.W.2d 295, 305 (Iowa 1990). Despite this broad authority, rational basis review of a taxing scheme is not tantamount to no judicial review. Even in the area of taxation, the legislature must not act in a wholly arbitrary manner in classifying persons or otherwise engage in invidious discrimination. *Great Atl. & Pac. Tea Co. v. Valentine,* 12 F.Supp. 760, 765 (S.D.Iowa 1935); *Fed. Land Bank of Omaha v. Arnold,* 426 N.W.2d 153, 156 (Iowa 1988).

1. Are Racetracks and Riverboats Similarly Situated?

The first step in our constitutional analysis is to determine whether racetracks and riverboats are similarly situated plaintiffs singled out for differential treatment. The State suggests racetracks and riverboats are not within the same class of activities for purposes of equal protection. We disagree. While it is true some differences exist between the two gaming facilities, a "'mere difference is not enough.' It must be relevant or pertinent as well as rational." *Deadwood, Inc. v. North Carolina Dep't of Revenue,* 557 S.E.2d 596, 599 (N.C. Ct. App. 2001) (citation omitted). Here, the State does nothing more than cite to mere differences. *See, e.g., Bierkamp v. Rogers,* 293 N.W.2d 577, 585 (Iowa 1980) (where passengers of automobiles were treated differently than passengers in other

conveyances, the court found a violation of equal protection); *Gleason v. City of Davenport*, 275 N.W.2d 431, 435 (Iowa 1979) (though not the same, the court found an equal protection violation where charter cities were treated differently than other cities because no "special or unique needs" of charter cities justified the differential treatment). We find none of the differences sufficiently compelling to find racetracks and riverboats are not of the same class.

The State contends riverboats and racetracks are different classes simply because one is land-based whereas the other floats on water. At first blush, this is an appealing argument. However, in reality the essence of the differential treatment is not rooted in the dissimilar scenery surrounding the main activity at both facilities. Rather, the heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. Where the same activity is being taxed at significantly different rates, a mere difference in location is not sufficient to uphold the discriminatory tax.

Both facilities exist for the purpose of operating gambling games. The bulk of both entities' revenue is from slot machines. For example, from July 1, 1998 through June 30, 1999, Prairie Meadows' adjusted gross revenue and its slot revenue were identical since the horse tracks have no net revenue. During this same time period, the Miss Marquette riverboat had adjusted gross income of over $32 million, almost $27 million of which came from

slot revenue.[3] If the bulk of their revenue was not based on slot machines, but rather we were called upon to determine whether horse revenue is different from gambling table revenue, our conclusion may be different. However, because most of the entities' revenue is derived from the same source, it is of little consequence that there are other different types of gambling games available at racetracks and riverboats. More importantly, both facilities are authorized to operate within the same gaming industry. Both operate slot machines that are the primary revenue-making vehicle for both facilities. Racetracks and riverboats serve gambling games to the same group of consumers. Both gaming facilities are equally important to the State in terms of revenue production. We conclude racetracks and riverboats are of the same class for purposes of this equal protection challenge. If the taxing statute treats them differently and there is no rational basis for such differential treatment, the statute violates equal protection.

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[3] From July 1, 1998 through June 30, 1999, Bluffs Run's adjusted gross revenue was over $110 million, $109 million of which came from slot revenue; and Dubuque had the same in adjusted gross revenue as it did from slot revenue. In total, all of the Iowa racetracks combined had over $281 million adjusted gross revenue, over $280 million of which came from slot revenue. In comparison, during the same fiscal year, Diamond Jo had over $44 million in adjusted gross revenue, over $36 million of which came from slot revenue; Mississippi Belle II had over $27 million adjusted gross revenue, over $25 million of which came from slot revenue; Catfish Bend had over $28 million adjusted gross revenue, over $23 million of which came from slot revenue; and Belle of Sioux City had over $25 million adjusted gross revenue, almost $19 million of which came from slot revenue. The riverboats had a total of over $513 million adjusted gross revenue, over $418 million of which came from slot revenue.

2. Does the Statute Have a Rational Basis?

Having concluded racetracks and riverboats are similarly situated, we must determine whether the differential tax is rationally related to a legitimate government interest. Equal protection requires the same treatment for similarly situated individuals. *Bowers,* 638 N.W.2d at 689. "'If people are not similarly situated, their dissimilar treatment does not violate equal protection.'" *Id.* (quoting *In re Morrow,* 616 N.W.2d at 548). Since the classification of persons in this case involves neither a suspect class, nor a fundamental right, we need only find the legislature had a rational basis. *Id.* In reviewing an equal protection challenge, we first examine "the legitimacy of the end to be achieved; we then scrutinize the means used to achieve that end." *Arnold,* 426 N.W.2d at 156. To satisfy the rational basis standard, the classification of persons must be reasonable and operate equally upon all within the class. *Id.* The Racetracks can overcome the presumption of constitutionality only by showing the statute is patently arbitrary and bears no rational relationship to a legitimate governmental interest. *Bowers,* 638 N.W.2d at 689.

Overriding this entire issue is the fact that the 1994 legislation was designed to save the racetracks and riverboats from financial distress. The racing industry in Iowa initially saw some success. However, as time passed, the racetracks quickly began to lose significant revenue.[4]

[4] For instance, in 1989 the Waterloo racetrack realized a profit of almost $29 million dollars. However, by 1993, the revenue at this racetrack steeply declined to nearly $13 million. The racetracks at Council Bluffs and Dubuque saw similar fates. Council Bluffs started

(Continued on following page)

Likewise, the riverboats' initial success was soon followed by financial problems stemming from competition from other states. The primary reason the legislature authorized racetracks to operate slots was to provide them with increased revenue. Without revenue from the slot machines, the Racetracks' future was in question.

In determining whether the tax statute is constitutional, we must consider whether the asserted purpose behind this tax could have been the genuine goal of the legislation. *See Nordlinger v. Hahn,* 505 U.S. 1, 15-16, 112 S. Ct. 2326, 2334-35, 120 L. Ed. 2d 1, 15-16 (1992). The very same legislation designed to help the racetracks recover from economic distress also increased the tax on racetrack slots at a rate eighty percent higher than the tax imposed on riverboat slots. Though the State contends the stated purpose behind the racetracks is to encourage economic development and promote agriculture, this differential tax is contrary to such alleged intent. Moreover, any stated benefit from the 1994 legislation is substantially jeopardized by the new tax rate imposed on the racetracks. We "need not in equal protection cases accept at face value assertions of legislative purposes, when . . . the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 n.16, 95 S. Ct. 1225, 1233 n.16, 43 L. Ed. 2d 514, 525 n.16

with an annual revenue of over $105 million but showed an annual revenue in 1993 of little more than $42 million. In 1989, Dubuque's racetrack made over $65 million, but the annual revenue figures in 1993 were just over $7 million. Finally, the racetrack in Altoona began with almost $38 million in revenue, but by the end of 1993 realized only $5 million.

(1975). We now turn to the effect the differential taxing scheme has on both racetracks and riverboats.

Overall, the differential tax treats racetrack slot machines significantly differently than riverboat slot machines despite the fact slots make up the substantial portion of both gaming facilities' revenue. The direct result of the tax is that Racetracks must pay drastically more additional tax than riverboats are required to pay. As the tax rate increases, each of the racetracks has been and will continue to be forced to pay increasingly significant additional tax on gross receipts. For example, if Prairie Meadows' revenue remains the same as it was in 1999, it will pay almost $44 million dollars more in taxes for the years 2000-2002 than it would if it were a riverboat. The Dubuque Racing Association will pay an extra $9 million in taxes and the Iowa West Racing Association is expected to pay an additional $36 million dollars in taxes for these tax years. It is undisputed that because both racetracks and riverboats conduct gambling games, the two facilities are in direct competition. As a result of the differential tax rate, riverboats have a competitive advantage over racetracks.

Because the differential taxing scheme forces racetracks to pay eighty percent more taxes than they would as riverboats, the tax frustrates the racetracks' responsibility to distribute money to local government and charitable organizations. The racetracks are statutorily required to distribute profits "for educational, civic, public, charitable, patriotic, or religious uses." Iowa Code § 99F.6(4)(a). The thirty-six percent tax rate makes it difficult, if not impossible, for the racetracks to continue to make such societal contributions. When the gaming tax reaches thirty-six percent in 2003, many of the racetracks

will have little, if any, profit. Without these grants and charitable gifts, many Iowa communities and charitable organizations will suffer.

Similarly, this taxing scheme frustrates the racetracks' ability to contribute to the overall economy of this state. The racetrack industry is responsible for employing hundreds of Iowans. It also supports the horse industry by distributing millions of dollars to purse supplements. The differential tax takes away the money racetracks need to accomplish these legislatively mandated goals. Overall, the effect of the tax is contrary to the legislative purpose of promoting agriculture and economic development.

A comparable situation is found in the dog-racing industry. The legislature stated the pari-mutuel dog racing industry is designed for "the development and promotion of Iowa greyhound racing dogs in this state." *Id.* § 99F.6(4)(b). The viability of pari-mutuel dog racetracks is completely dependent on slot revenue. A certain percentage of the dog tracks' adjusted gross receipts must be used to supplement purses of live dog races. *Id.* § 99D.12. Given these facts the differential tax scheme frustrates the alleged purposes behind allowing racetracks to operate. Though allegedly the legislation including the differential tax was designed to help the racetracks, eventually the thirty-six percent tax on gross receipts will seriously jeopardize the racetracks' viability.

Given the above facts, the inescapable conclusion is the differential tax is not rationally related to the main purpose of the legislation or to the intent behind authorizing racetracks to operate in this state. The stated purpose was allegedly to save the racetracks from economic distress. There can be no rational reason for this differential

tax, unless the reason for it was to drive the racetracks out of business, thereby helping the riverboat industry. Unless we recognize the desire to discriminately tax one business for the purpose of supporting another similarly situated business as a legitimate government interest, we can find no other basis for upholding this law. When the stated purpose is not true or somehow misleading, we cannot find it was the real reason behind the legislation. If the offered purpose is not the genuine reason supporting the law, it likewise cannot be characterized as a rational reason. In the case before us, because the stated purpose of the legislation is frustrated by the legislation itself, it is impossible to conclude the legislature actually had its alleged purpose in mind when enacting this taxing statute.

The State appears to suggest a reason for the tax is the pure fact that the market will allow it – that the racetracks can bear a higher tax than the riverboats. Even if this is true, it is not a rational basis for upholding the discriminatory tax. Though revenue production may be a legitimate state interest, this goal is not rationally served by a taxing scheme that discriminates against certain slot machines simply because of their geography. "[A] revenue measure based on gross receipts must apply equally to all for the privilege of doing the same act." *Finlayson v. Conner,* 167 So.2d 569, 572 (Fla. 1964); *see also Tweel v. West Virginia Racing Comm'n,* 76 S.E.2d 874, 879 (W. Va. 1953) (statute must apply equally to those of the same class and each member of the class permitted to engage in such business must be treated substantially alike). If the legislature wants to increase state revenue, then it must tax racetracks and riverboats equally at a rate they both can bear.

The State made other contentions not accepted by the trial court. We likewise find them unconvincing. None of the other justifications offered by the State in an effort to support the constitutionality of this tax scheme are rationally related to a legitimate state interest. Each justification ignores the plain fact that this differential tax completely defeats the alleged purpose of the 1994 legislation. The thirty-six percent tax rate does nothing to further the economic viability of the racetracks. Moreover, we are not persuaded that our state riverboat history can only be promoted through such favoritism as taxing racetracks at an eighty percent higher rate than riverboats. The State can make riverboats more competitive with other states without penalizing racetracks through a thirty-six percent tax on gross receipts. At a minimum, the tax frustrates the legislative purpose in permitting racetracks to operate. The legislation goes even further, however, by disabling an industry it was allegedly designed to aid.

In sum, no legitimate reason has ever been offered for the differential tax rate. We can find no rational connection between the discriminatory tax and the alleged intent of promoting riverboat history. The reason for the tax is not that racetracks and riverboats are different. It is not that the two entities operate slightly different types of gambling games. We cannot justify this tax based on the fact racetracks operate on land whereas riverboats operate on water. And the tax is not designed to force the racetracks to make up for past tax breaks. Rather, it appears the purpose behind this discriminatory legislation was simply to allow the state to collect increased revenue from racetrack slots despite the fact they, like the riverboats, derive most of their revenue from slot machines. Where an

additional tax based on gross receipts is imposed on only one member of the same class, purely for tax revenue purposes, the tax violates the federal and state equal protection clauses. *See Volusia County Kennel Club v. Haggard,* 73 So.2d 884, 890 (Fla. 1954). We conclude the tax rate imposed upon the Racetracks is unconstitutional. We reverse and remand.

B. Remedy for Constitutional Violation

The State argues Iowa courts do not have the power to invalidate unconstitutional statutory schemes because this is strictly a legislative function. The district court found this argument to be "wholly without merit." Taken to its logical extreme, the State's argument means the legislature could pass any type of taxing scheme it desires, including unconstitutional ones, because it is immune from judicial review. This outcome is clearly not supported by case law as both state and federal courts have reviewed the constitutionality of particular taxing schemes. *See, e.g., South Cent. Bell Tel. Co. v. Alabama,* 526 U.S. 160, 119 S. Ct. 1180, 143 L. Ed. 2d 258 (1999); *Hearst Corp.,* 461 N.W.2d at 295; *Atchison, Topeka & Sante Fe Ry. v. Blair,* 338 N.W.2d 338 (Iowa 1983). We conclude the district court correctly denied the State's motion for summary judgment on this issue. We affirm.

IV. Conclusion

The fact remains that the Racetracks are burdened with a significant tax which the riverboats are not required to bear. We can find no rational reason for treating racetrack slot machines differently than riverboat slot machines. Because we are obligated to preserve as much of

a statute as possible within constitutional restraints, we only declare unconstitutional that portion of the statute that imposes the discriminatory tax upon racetracks. *See Clark v. Miller,* 503 N.W.2d 422, 425 (Iowa 1993). The second sentence of the first paragraph of Iowa Code section 99F.11 shall be stricken and what remains is the same twenty-two percent tax on gross receipts over three million dollars for both racetracks and riverboats. Because we find the Racetracks satisfied their heavy burden to prove the tax scheme in Iowa Code section 99F.11 is not rationally related to a legitimate state interest, summary judgment should not have been granted. We therefore reverse on the appeal. We also conclude the district court properly denied the State's motion for summary judgment based on the State's assertion the court does not have authority to grant relief in this case. The cross-appeal is therefore affirmed. We remand for determination of appropriate relief.

REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.

All justices concur except Neuman, Carter, and Cady, JJ., who dissent.

#54/01-0011, *Racing Ass'n of Cent. Iowa v. Fitzgerald*

NEUMAN, Justice (dissenting).

I respectfully dissent. One slot machine may be the same as the next. But the legislature was looking at the bigger picture, and so must we.

Under the guise of entertainment and economic development, the State permits gaming corporations to lawfully part their customers from their money. Quite a lot of that money – thankfully – returns to the State in the

form of tax receipts. The question is whether that taxing scheme, which differentiates between gaming on riverboats and gaming at racetracks, bears a rational relationship to a legitimate state interest. I think it does. At least the challengers here have not convinced me beyond a reasonable doubt that it does not.

Riverboats are not the same as racetracks. From an entertainment perspective, they speak to different cultural traditions – river lore versus agriculture. The majority questions these distinctions once gaming is attached to the enterprise. But there is no constitutional impediment to a legislature favoring diversity in cultural attractions for its citizens and tourists. And, rightly or wrongly, a legislative majority could rationally determine that a riverboat casino holds more romantic tourist appeal than a casino stuck in a dog track.

To advance these policy decisions, a reasonable legislature would also want to recognize a very pragmatic distinction between the two gambling venues: riverboats are mobile, racetracks are not. If the economic climate turns unfavorable here, a riverboat merely unties its lines and sails elsewhere. So it is not unreasonable for the legislature to create economic incentives to develop or retain riverboat gambling while maintaining the status quo with respect to other forms of the sport.

In short, there are a number of rational reasons why the legislature might tax land-based casinos differently from river-based ones. They are different enterprises. We might not agree with the legislature's rationale; we might think the tracks should enjoy a more competitive playing field or that gambling is a bad idea all the way around. But our views on the matter are irrelevant. Our concern is

limited to finding a rational basis for the taxing scheme that passes constitutional muster. Because such a rational basis exists here, I would affirm the district court's rejection of the appellants' constitutional challenge.

Carter and Cady, JJ., join this dissent.

**IN THE IOWA DISTRICT COURT
FOR POLK COUNTY**

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION, **Plaintiffs,** **vs.** **MICHAEL FITZGERALD, TREASURER, STATE OF IOWA,** **Defendant.**	**Case No. CE 36601** **RULING ON DEFENDANT'S MOTION TO STRIKE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT and PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT** (Filed Dec. 4, 2000)

The above captioned motions came before the Court for hearing on October 11, 2000. Plaintiff Racing Association of Central Iowa was represented by its attorneys, Mark McCormack and Thomas L. Flynn. Plaintiff Dubuque Racing Association, Inc was represented by its attorney Stephen C. Krumpe. Plaintiff Iowa West Racing Association was represented by its attorney Lawrence P. McLellan. Plaintiff Iowa Greyhound Association was represented by its attorney Jerry Crawford. Defendant was represented by its Assistant Attorney General Jean M. Davis. Following oral argument and upon review of the court file, the Court enters the following Ruling.

RULING

I. STATEMENT OF THE FACTS

Plaintiff Racing Association of Central Iowa (hereafter "RACI") is a nonprofit corporation that operates a pari-mutual racetrack and casino known as Prairie Meadows Racetrack and Casino in Altoona, Iowa, pursuant to Iowa Code chapters 99D and 99F. Plaintiff Dubuque Racing Association, Ltd. (hereafter "DRA") is a nonprofit corporation that operates a pari-mutual racetrack and casino known as a Dubuque Greyhound Park & Casino in Dubuque, Iowa, pursuant to Iowa Code chapters 99D and 99F. Plaintiff Iowa West Racing Association (hereafter "IWRA") is a nonprofit corporation that holds the gaming license and owns the slot machines for Bluffs Run Racetrack and Casino, pari-mutual racetrack and casino in Council Bluffs, Iowa, pursuant to Iowa Code chapter 99D and 99F. Plaintiff Iowa Greyhound Association (hereafter "IGA") is an organization of greyhound owners that race at Dubuque Greyhound Park and Bluffs Run and is the entity selected by the Iowa Racing and Gaming Commission (hereafter "Commission") to receive and distribute greyhound purses supplements. Defendant Michael Fitzgerald is the Treasurer for the State of Iowa.

The Racetrack Plaintiffs[1] are legally authorized to conduct two distinct types of gambling. The first type is pari-mutual wagering on dog or horse races. Iowa Code § 99D.11 (1999). Racetracks may also accept pari-mutual wagering on live races conducted at that track or on

[1] RACI, DRA, and IWRA will be collectively referred to as the "Racetrack Plaintiffs" or the "racetracks."

simultaneous telecast or televised race approved by the Commission. *Id.* Second, the racetracks may operate "gambling games." *Id.* at § 99F.4A(1). "Gambling games" means any game of chance authorized by the Commission. *Id.* at § 99F.1(9). However, while a racetrack may offer slot machines, they may not offer games of chance or video machines. *Id.*

Iowa also authorizes a second type of gambling establishment, namely, excursion gambling boats (hereafter "riverboats"). *Id.* at § 99F.3. Unlike racetracks, riverboats may not offer wagering on dog or horse races but may offer wagering on a larger variety of gambling games. *Id.* at § 99F.1(9). Specifically, as applied to riverboats, "gambling games" is defined to include table games and video machines. *Id.* Similarly to racetracks, riverboats also offer slot machines. *Id.*

The controversy in this case centers around the differential tax rate based on receipts generated from gambling games. In 1994, the Iowa Legislature enacted legislation (H.F. 2179) which (a) legalized slot machines at racetracks, (b) eliminated loss limits at riverboats, and (c) provided for a differential wagering tax on gambling games. Pursuant to the Iowa Code, Iowa riverboats are taxed "at the rate of five percent on the first one million dollars of adjusted gross receipts, at the rate of ten percent on the next two million dollars of adjusted gross receipts, and at the rate of twenty percent on any amount of adjusted gross receipts over three million dollars." *Id.* at § 99F.11. "However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetrack enclosures is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is

thirty-six percent." *Id.* Thus, the adjusted gross receipts from gambling games generated by the racetracks were taxed at the rate of 22% for the 1997 calendar year, 24% for the 1998 calendar year, 26% for the 1999 calendar year, and are currently being taxed at 28% for the 2000 calendar year. This rate will increase each year until 2004 at which time the rate will be 36%.

II. STATEMENT OF THE CASE

On June 25, 1998, Plaintiff RACI filed a Petition in Equity. On June 30, 1998, Plaintiff filed an Amended and Substituted Petition in Equity, alleging equal protection and due process challenges to the constitutionality of the wagering tax rate on pari-mutual racetracks licensed under Iowa Code chapter 99D.[2] Plaintiffs seek relief under 42 U.S.C. §§ 1983, 1988; the Fourteenth Amendment to the United States Constitution; and Article 1 section 6, and Article III, section 30 of the Iowa Constitution, requiring that laws have a general and uniform operation.

On March 27, 2000, Defendant filed a Motion for Summary Judgment. On July 31, 2000, Plaintiffs filed a Cross-Motion for Summary Judgment. On August 7, 2000, Defendant filed a Motion to Strike Portions of Plaintiffs' summary judgment materials. These three motions are the subject of this Ruling and will be discussed in turn.

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[2] As the case progressed, the remaining Plaintiffs joined the case.

III. DEFENDANT'S MOTION TO STRIKE

Within his motion, Defendant seeks to strike Plaintiffs' exhibits 6-10, which Plaintiffs attached to their Motion for Summary Judgment, and all summary judgment materials referencing exhibits 6-10. Specifically, Defendant contends that exhibits 6-10, all affidavits from Iowa legislators, are inadmissible as they are merely opinions of the individual legislators. As support for his argument, Defendant directs the Court to *Willis v. City of Des Moines*, 357 N.W.2d 567 (Iowa 1984).

According to the *Willis* Court, opinions offered by legislators are inadmissible on the subject of legislative intent. *Id.* at 571 (citing *Iowa State Education Ass'n v. Public Employment Relations Bd.*, 269 N.W.2d 446, 448 (Iowa 1978); *Consolidated Freightways Corp. v. Nicholas*, 258 Iowa 115, 122, 137 N.W.2d 900, 905 (1965); *Tennant v. Kuhlemeier*, 142 Iowa 241, 245, 120 N.W. 689, 690 (1909); *State v. Burk*, 88 Iowa 661, 664-65, 56 N.W. 180, 181 (1893)). The Court noted that:

> the opinions of individual legislators, remarks on the passage of an act or the debates accompanying it, or the motives or purposes or individual legislators, or the intention of the draughtsman are too uncertain to be considered in the construction of statutes.

Id. (quoting *Tennant v. Kuhlemeier*, 142 Iowa at 245, 120 N.W. at 690).

However, in ascertaining legislative intent, courts may consider the legislative history of the statute. *Goodell v. Humboldt County*, 575 N.W.2d 486, 500 (Iowa 1998) (citing Iowa Code § 4.6(3)). In line with this precept, Plaintiffs contend that exhibits 6-10 merely set forth

appropriate and relevant evidence to assist the Court in its analysis of the statute involved in the present case. Plaintiffs assert that this evidence is not being presented to the Court to demonstrate the subjective state of mind of the individual legislators; rather, it constitutes an objective report of legislative discussion and events leading to the enactment.

This Court finds that in examining the background of legislation, it may consider affidavits from legislators. *See Miller v. Bair*, 444 N.W.2d 487, 488 (Iowa 1989) (employing affidavit of legislator describing background of legislation). Further, after a thorough review of exhibits 6-10, this Court finds that the legislators' affidavits merely state the factual background to the legislation and not that individual legislator's opinion as to the legislative intent or motive. Because the affidavits are relevant and proper in content, this Court must deny Defendant's Motion to Strike.

IV. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is only appropriate when the entire record before the court shows that no genuine issue of material fact is in dispute "and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c). The record on summary judgment includes the pleadings, depositions, answers to interrogatories, admissions on file, affidavits, and exhibits. *Id.*; *Fischer v. Unipac Serv. Corp.*, 519 N.W.2d 793, 196 (Iowa 1994). The moving party carries the burden of showing no issue of material

fact exists. *Wright v. American Cyanamid Co.*, 599 N.W.2d 668, 670 (Iowa 1999).

An issue of fact is "material" to the case when its determination may affect the outcome of the suit, given the applicable governing law. *Baratta v. Polk County Health Services*, 588 N.W.2d 107, 109 (Iowa 1999) (citing *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992)). An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the party resisting the motion for summary judgment. *Id.* (citing *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d at 57). Thus, in determining whether a motion for summary judgment is to be granted, this Court must determine whether "reasonable minds would differ on how the issue should be resolved." *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 813 (Iowa App. 1999) (citing *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996)).

Evidence in the entire record is viewed in the light most favorable to the party resisting the motion for summary judgment. *Shivvers v. Hertz Farm Management, Inc.*, 595 N.W.2d 476, 478-79 (Iowa 1999) (citing *McLain v. State*, 563 N.W.2d 600, 603 (Iowa 1997)). "Every legitimate inference that can be deduced from the evidence should be afforded the nonmoving party." *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 11 (Iowa 1999) (citing *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984)). The resisting party may not merely rely upon the allegations or denials found in the pleading, Iowa R. Civ. P. 237(e), but must, however, "set forth specific facts constituting competent evidence to support a prima facie claim." *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991) (citations omitted). This requirement is necessary "to weed out '[p]aper cases and defenses' in order 'to make

way for litigation which does have something to it.'" *Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997) (quoting *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989)).

In light of these principles, this Court reviews the record made in support and in resistance to the motion to determine whether summary judgment is an appropriate measure. *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d at 339.

B. Discussion

In essence, Plaintiffs allege the taxing statute in question violates four constitutional clauses, to wit: the equal protection and due process clauses guaranteed by the United States Constitution and equal protection and due process clauses found within the Iowa Constitution. Thus, this Court's [sic] first must examine the differing clauses.

The federal Due Process Clause prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. The Iowa Due Process Clause provides that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa const. art. I, § 9.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits states from "deny[ing] . . . any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV, § 1. Similarly, the Iowa Constitution prohibits laws that "grant to any citizen, or class of citizens, privileges or

immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6.

Iowa courts are to "apply the same analysis in considering the state equal protection claim as . . . in considering the federal equal protection claim." *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000) (quoting *State v. Ceaser,* 585 N.W.2d 192, 196 (Iowa 1998)). Directly on point, the Iowa Supreme Court stated:

> Article III, section 30, and Article I, section 6, of our state constitution . . . require the law in question to have a uniform operation throughout the state. The effect of section 1, Fourteenth Amendment to the Constitution of the United States as applied to this case is substantially the same as these uniformity provisions of our own constitution. In general, is [sic] a law does not offend against one constitution it is inoffensive to the other.

Heritage Cablevision v. Marion County Bd. of Supervisors, 436 N.W.2d 37, 38 (Iowa 1989) (quoting *Dickinson v. Porter*, 240 Iowa 393, 400, 35 N.W.2d 66, 71-72 (1949)). Likewise, the Iowa Due Process Clause is deemed to be "identical in scope, import, and purpose" as the federal Due Process Claus. *Exira Community School Dist. v. State*, 512 N.W.2d 787, 792 (Iowa 1994) (*Bruns v. State*, 503 N.W.2d 607, 609-11 (Iowa 1993)).

Returning to the case at hand, the crux of Plaintiffs' argument regarding the constitutionality of the taxing legislation is based upon an equal protection analysis. Plaintiffs' due process claims appear to be aimed at a tax refund should the statute be deemed unconstitutional. *Hagge v. Iowa Dep't of Revenue and Fin.*, 504 N.W.2d 448, 452 (Iowa 1993) (holding that if the state has exacted

taxes from an unconstitutional tax, due process requires the state to afford taxpayers opportunity for postpayment relief) (citations omitted). *See also McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36, 110 S. Ct. 2238, 2250 (1990) (stating that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause"); 71 Am. Jur. 2d *State and Local Taxation* § 110 (1973) (stating that when a taxing statute is unconstitutional, state effectively took property without due process of law). Thus, in regard to Plaintiffs' substantive claim, the issue boils down to whether Iowa Code § 99F.11 violates the protections guaranteed through the Equal Protection Clause.

"Equal protection requires that those who are similarly situated be treated similarly." *Kuta v. Newberg*, 600 N.W.2d 280, 288 (Iowa 1999) (citing *Norland v. Grinnell Mut. Reins. Co.*, 578 N.W.2d 239, 241 (Iowa), cert. denied, 525 U.S. 932, 119 S. Ct. 342, 142 L. Ed.2d 282 (1998)). However, "[a]ll persons need not be treated alike to meet constitutional standards for equal protection." *Iowa Dep't of Transp. v. Iowa Dist. Court for Pottawattamie County*, 592 N.W.2d 41, 43 (Iowa 1999) (citing *State v. Bell*, 572 N.W.2d 910, 912 (Iowa 1997)). The first step in analyzing an equal protection question is to determine the applicable test: strict scrutiny or rational-basis. *State v. Phillips*, 610 N.W.2d 840, 844 (Iowa 2000). "Where, as here, the challenged tax classifications do not adversely affect a fundamental interest and are not based upon suspect criteria, they are tested under the more lenient standard of rationality, traditionally applied in evaluating equal protection challenges to regulation of economic and commercial

matters." *Heritage Cablevision v. Marion County Bd. of Supervisors*, 436 N.W.2d at 38 (citing *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96, 103 S. Ct. 2296, 2308, 76 L. Ed.2d 497, 513 (1983)).

The Iowa Supreme Court explained the rational-basis test for equal protection challenges as:

> [The challenged classification must be sustained] unless the challenging party can demonstrate that it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. Under the rational basis test, a legislative classification is upheld if any conceivable state of facts reasonably justifies it.

Exira Community School Dist. v. State, 512 N.W.2d 787, 793 (Iowa 1994) (quoting *Kent v. Polk County Bd. of Supervisors*, 391 N.W.2d 220, 224-25 (Iowa 1986) (alteration in original)).

> The general principles applicable to the determination of the constitutionality of the challenged statutory provision are well established. All presumptions are in favor of the constitutionality of the statute and will not be held invalid unless it is clear, plain and palpable that such decision is required. The legislature may pass any kind of legislation it sees fit so long as it does not infringe the state or federal constitutions. Courts do not pass on the policy, wisdom, advisability or justice of the statute. The remedy of those who contend legislation which is within constitutional bounds is unwise or oppressive is with the legislature. . . . Plaintiffs have the burden to demonstrate beyond a reasonable doubt the act violates the constitutional provision invoked and to point out with particularity the details of the alleged

> invalidity. To sustain the burden plaintiffs must negate every reasonable basis which may support the statute. Every reasonable doubt is resolved in favor of constitutionality. . . . An iron rule equal taxation is neither attainable nor necessary.

Heritage Cablevision v. Marion County Bd. of Supervisors, 436 N.W.2d at 38 (quoting *City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa1977)).

"This presumption in favor of constitutionality is especially strong where the statute was enacted to promote a public purpose and relates to taxation." *Kraft v. Department of Revenue and Fin.*, 465 N.W.2d at 667 (citing *Lee Enters., Inc. v. Iowa State Tax Comm'n*, 162 N.W.2d 730, 739 (Iowa 1968)). As the United States Supreme Court said:

> in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily joy [sic] a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against persons or classes.

Madden v. Kentucky, 309 U.S. 83, 88, 60 S. Ct. 406, 408, 84 L. Ed. 590 593 (1940) (citation omitted). *See also Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 872 (1937) (stating that the Court "has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exception infringe no constitutional limitation"); *Hearst v. Iowa Dept of Revenue and Fin.*, 461 N.W.2d 295, 305 (Iowa

1990) (stating that in matters of taxation, the legislators have the greatest freedom in classification). Thus, "[i]t is widely recognized that the rational basis standard is easily satisfied in challenges to tax statutes." *Heritage Cablevision v. Marion County Bd. of Supervisors*, 436 N.W.2d at 38.

In light of these principles, this Court examines whether Plaintiffs have met their "staggering burden" in demonstrating that Iowa Code § 99F.11 violates the equal protection clauses. Specifically, Plaintiffs must establish beyond a reasonable doubt that there is no legitimate governmental interest in the taxing statute's discriminatory treatment between riverboats and racetracks.

Defendant presents several purportedly rational reasons to tax the two entities differently. In response Plaintiffs attempt to negate each asserted justification. Further, Plaintiffs contend that should they negate the justifications, they must prevail. However, case law does not support Plaintiffs' position. Plaintiffs have the burden to negate every conceivable basis for supporting the statute, not merely those posed by Defendant. As the United States Supreme Court stated, a "State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by the evidence or empirical data.'" *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 3642-43, 125 L. Ed.2d 257 (1993) (internal citations omitted). *See also Iowa Dep't of Transp. v. Iowa Dist. Court for Pottawattamie County*, 592 N.W.2d at 43 (citing *McMahon v. Iowa Dept' of Transp.*, 522 N.W.2d 51, 57 (Iowa 1994)). Further, this Court must make its own inquiry to determine whether "the legislature could

conclude that the classification would promote a legitimate state interest." *Sperfslage v. Ames City Bd. of Review*, 480 N.W.2d at 49 (citations omitted).

The problem this Court finds in respect to Plaintiffs argument is that "it has repeatedly been held and appears to be settled that a statute which encourages the location within the State of needed and useful industries" by discriminatory taxation provisions is not arbitrary and does not violate the Equal Protection Clause of the United States Constitution. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 528, 79 S. Ct. 437, 441 (1959) (citing *Bell's Gap R.R. Co. v. Commonwealth of Pennsylvania*, 134 U.S. 232, 237, 10 S. Ct. 533, 535, 33 L.Ed. 892 (1890); *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159, 50 S. Ct. 310, 313, 74 L.Ed. (1930); *Williams v. Mayor and City Counsel of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933); *Colgate v. Harvey*, 296 U.S. 404, 439, 56 S. Ct. 252, 263, 80 L. Ed. 299 (1935) (dissenting opinion). *See also Zobel v. Williams*, 457 U.S. 55, 67, 102 S. Ct. 2309, 2317, 72 L. Ed.2d 672 (1982) (Brennan, J., concurring) (stating that state may undertake to advance certain industries within its borders); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60, 93 S. Ct. 1001, 1003-04, 35 L. Ed.2d 351 (1973) (holding that state may impose different tax rate upon different trades, professions, or products). Further, "[t]he legislature may withhold the burden of tax in order to foster what it conceives to be a beneficial enterprise . . . or a depressed industry." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. at 512-13, 57 S. Ct. at 874 (citations omitted). *See also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271, 104 S. Ct. 3049, 3055, 82 L. Ed.2d 200 (1984) (noting that state may enact laws to promote new industry in state).

As these principles apply to the case at hand, this Court finds the Iowa Legislature has a legitimate interest in promoting development of certain areas within its borders (*e.g.*, river town development). This interest alone may justify the discriminatory tax rate. Additionally, the Iowa Legislature could conclude riverboats foster the beneficial purpose of preserving Iowa's riverboat history. *See* Iowa Code § 99F.7(3) (as a condition of receiving a excursion gambling boat license, the applicant must "develop, and as nearly as practicable, recreate boats that resemble Iowa's riverboat history"). Or simply, the Iowa Legislature could have concluded that river boats should receive a beneficial tax rate because it is a needed or useful industry. In sum, for purposes of the motion before the Court at this time, this Court merely finds that Plaintiffs have failed to meet their burden in establishing that they are entitled to summary judgment as a matter of law.

V. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

As to the standard of review and the underlying legal principles guiding this case, see supra IV.A and B.

In support for its Motion for Summary Judgment, Defendant presents several arguments, to wit, (1) Iowa possesses a legitimate interest in segregating the tax burden between pari-mutual racetracks and excursion gambling boats; (2) Defendant Fitzgerald is not a proper party; (3) Plaintiff cannot recover damages due to the Eleventh Amendment Immunity; and (4) this Court cannot grant injunctive relief because it has no authority to set a tax rate. Each contention will be discussed in turn.

A. Legitimate State Interest

Defendant first forwards the argument that he is entitled to summary judgment because Iowa Code § 99F.11 is reasonably related to a legitimate state interest. Essentially, this argument is the reverse side of Plaintiffs' Motion for Summary Judgment. Instead of asking this Court to conclude that the undisputed facts indicate that there [sic] no legitimate state interest in enacting this discriminatory tax, as Plaintiffs did, Defendant contends that the undisputed facts demonstrate that there is a legitimate state interest as a matter of law. Thus Defendant concludes that this tax does not violate the federal or state constitutions and his Motion for Summary Judgment should be granted.

Because Defendant's motion involves the identical legal principles as set forth in Part IV.B, this Court finds it unnecessary to restate them. This Court does note the unique procedural consequences of Defendant raising his argument via a motion for summary judgment. As this Court noted within its discussion of Plaintiffs' Motion, because Plaintiffs are challenging a statute on constitutional grounds, they bear a staggering burden of proof. *Heritage Cablevision v. Marion County Bd. of Supervisors*, 436 N.W.2d at 38. However, according to the well-settled principles of summary judgment, the moving party bears the burden of proof. Therefore, for purposes of his summary judgment, Defendant would bear the burden of demonstrating that there are no material issues of fact in dispute and that he is entitled to summary judgment as a matter of law. *Jain v. State*, 617 N.W.2d 293, 297 (Iowa 2000) (quoting *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995). As a final procedural twist to Defendant's motion, this Court has already determined within

Plaintiffs' Motion for Summary Judgment that there exists at least one rational legislative purpose in taxing riverboats and racetracks at different rates.

This Court believes the last fact to be determinative to the issue. This Court has determined that as a matter of law, there exists at least one rational basis to support Iowa Code § 99F.11. *See* supra IV.B. Thus, as a matter of law, the taxing statute passes constitutional scrutiny and Defendant is entitled to judgment. The fact that Defendant failed to raise any of the reasons upon which this Court relied on in reaching its conclusion is of no consequence. According to the rules of statutory review based upon constitutional challenges, the court is to make its own inquiry to determine whether a rational basis exists. *See Sperfslage v. Ames City Bd. of Review*, 480 N.W.2d at 49. For this reason, this Court must conclude that Defendant is entitled to summary judgment.

In the interest of justice, this Court will briefly address Defendant's remaining arguments.

B. Proper Party

Second, Defendant contends that this Court should grant his Motion for Summary Judgment because he is not a proper party. Defendant asserts that under *Hatfield v. Williams*, 376 F. Supp. 212, 214 (N.D.Iowa 1974), to render a state official a proper defendant in a suit to enjoin application of a state statute, the officer must have some connection with the enforcement of the statute. Accordingly, Defendant concludes, because he possesses no authority to enforce the wagering tax, his connection is too insubstantial to render him a proper party.

According to their Amended and Substituted Petition in Equity, Plaintiffs seek to enjoin the collection of the wagering tax on gambling games other than at a uniform rate. In such an action, it appears to this Court as though the Treasurer of the State of Iowa is the appropriate party. *See Carlton v. Grimes*, 237 Iowa 92, 23 N.W.2d 883 (1946) (plaintiffs sought to enjoin the Treasurer of the State from collecting specific tax). Therefore, this Court finds no merit in Defendant's second argument.

C. Eleventh Amendment Immunity

Next Defendant contends that Plaintiffs cannot maintain an action against a state official in his or her official capacity because the Eleventh Amendment bars such actions. Specifically, Defendant contends that because Plaintiffs seek monetary damages from Defendant in his official capacity pursuant to 42 U.S.C. § 1983, and these funds would be payable from the public treasury, Plaintiffs suit is barred by the Eleventh Amendment.

First and foremost, this Court notes that Defendant's argument is only directed towards Plaintiffs' § 1983 claim. In other words, Plaintiffs' claims based upon the United States and Iowa Constitutions are not the subjects of Defendant's Eleventh Amendment argument.

Returning to the issue at hand, § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

> thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The issue then becomes whether Plaintiffs' § 1983 claim from injunctive relief against Defendant should be dismissed pursuant to the Eleventh Amendment. Of particular relevance to this issue, the United State [sic] Supreme Court held "that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal or state court." *Howlett v. Rose*, 496 U.S. 356, 365, 110 S. Ct. 2430, 2437 (1990) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989)). Clearly, at initial glance, it appears as though Plaintiffs may not being [sic] a § 1983 suit against Defendant because of the Eleventh Amendment immunity.

However, Plaintiffs direct this Court to the *Will* decision which provides in part:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State."

Will v. Michigan Dep't of State Police, 491 U.S. at 71 n.10, 109 S. Ct. at 2312 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14 (1985); *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 453-54 (1908)). Therefore, Plaintiff [sic] argue that according to these Supreme Court decisions, the Eleventh Amendment is not applicable to claims for injunctive relief against a state official.

After a thorough consideration of this issue, this Court finds that Defendant has failed to meet his burden in establishing that he is entitled to summary judgment based upon the Eleventh Amendment. This Court is not holding that Defendant has no Eleventh Amendment immunity as a matter of law; rather, this Court merely concludes that Defendant failed to meet its burden in proving the applicability.

D. Court's Authority

Finally, Defendant asserts that he is entitled to summary judgment because this Court does not possess the authority to grant Plaintiffs' injunction relief. Namely, Defendant contends that taxation is a legislative function and as such, this Court may not set the rate of taxation. Thus, Defendant contends he is entitled to summary judgment.

This Court finds Defendant's contention to be wholly without merit. According to Defendant's logic, no court could ever address a constitutional challenge to a taxation scheme. Thus, a court could not remedy even the most discriminatory tax (*e.g.*, taxation rate based upon race or sex). Clearly, such a position finds no support in the case law. *See* supra IV.B (noting several cases discussing the

constitutionality of taxation schemes). While this Court may tend to agree that courts should be wary of creating new taxes, this Court not only possesses, but also is duty bound to employ its authority to strike unconstitutional statutes. Therefore, this Court finds that Defendant is not entitled to summary judgment based upon his final argument.

To conclude, this Court finds that Defendant is entitled to summary judgment based upon this Court's conclusion that Iowa Code § 99F.11 is reasonable related to a legitimate state interest. However, this Court finds the remainder of Defendant's arguments to be without merit.

V. ORDER

IT IS THE ORDER OF THE COURT that Defendant's Motion to Strike is DENIED.

IT IS THE FURTHER ORDER OF THE COURT that Plaintiffs' Motion for Summary Judgment is DENIED.

IT IS THE FURTHER ORDER OF THE COURT that Defendant's Motion for Summary Judgment is GRANTED.

SO ORDERED this 4th day of ~~November~~ December, 2000.

/s/ Scott D. Rosenberg
SCOTT D. ROSENBERG,
DISTRICT JUDGE
Fifth Judicial District of Iowa

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IN THE SUPREME COURT OF IOWA

No. 54/01-0011

ORDER

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Appellants,

vs.

MICHAEL FITZGERALD, TREASURER, STATE OF IOWA,

Appellee.

(Filed Aug. 6, 2002)

After consideration by the court, the Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Dated this 6th day of August, 2002.

THE SUPREME COURT OF IOWA
By /s/ Louis A. Lavorato
Louis A. Lavorato,
Chief Justice

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IN THE SUPREME COURT OF IOWA

No. 54/01-0011

CORRECTION ORDER

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Appellants,

vs.

MICHAEL FITZGERALD, TREASURER, STATE OF IOWA,

Appellee.

(Filed Sep. 6, 2002)

In that the court misstated one of the State's contentions was a cross-appeal, pursuant to Iowa Supreme Court Rule 21.26, the opinion in this case, filed June 12, 2002, is corrected as follows:

1. The second paragraph on the cover page, lines 3-5, which read

> constitutional equal protection claim and the State cross-appeals on the court's denial of its motion for summary judgment. **REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

is corrected to read as follows:

> constitutional equal protection claim. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

2. Page 3, line 6, which read

> rational basis exists for this differential tax treatment, we reverse and remand.

is corrected to read as follows:

> rational basis exists for this differential tax treatment, we affirm in part, reverse in part, and remand.

3. Page 5, lines 7-8, which read

> determine the appropriate tax rate. The Racetracks appeal and the State cross-appeals on these adverse rulings.

is corrected to read as follows:

> determine the appropriate tax rate. The Racetracks appeal.

4. Page 15, line 14, which read

> have been granted. We therefore reverse on the appeal. We also conclude the

is corrected to read as follows:

> have been granted. We therefore reverse. We also conclude the

5. Page 15, lines 17-18, which read

> case. The cross-appeal is therefore affirmed. We remand for determination of

is corrected to read as follows:

> case. We remand for determination of appropriate relief.

6. Page 15, lines 19-20, which read

> **REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

is corrected to read as follows:

> **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Corrected pages are attached to this order.

Dated this 6 day of September, 2002.

THE SUPREME COURT OF IOWA
By /s/ Michael J. Streit
Michael J. Streit, Justice

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IN THE IOWA DISTRICT COURT FOR
POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	)	EQUITY NO. 36601 AMENDED AND SUBSTITUTED PETITION IN EQUITY (Filed Jun. 30, 1998)

Plaintiff, Racing Association of Central Iowa (hereinafter "RACI"), for its Amended And Substituted Petition In Equity against Defendant Michael Fitzgerald, Treasurer, State of Iowa, states as follows:

1. RACI is a nonprofit corporation incorporated in and authorized to conduct business in Iowa.

2. RACI has its principal place of business in Polk County, Iowa.

3. Michael Fitzgerald is the Treasurer of the State of Iowa.

4. The Treasurer has the duty to uphold the fiscal laws of the State and as relevant here, receives the wagering tax imposed by Iowa Code § 99F.11.

5. In this action, RACI seeks relief under §§ 1983 and 1988 of Title 42 of the U.S. Code, the Fourteenth Amendment to the U.S. Constitution, and Article I, § 6 and Article III, § 30 of the Iowa Constitution.

6. RACI, pursuant to license and under the name "Prairie Meadows Racetrack and Casino," operates gambling games at a pari-mutuel racetrack enclosure.

7. Under Iowa Code § 99F.11, adjusted gross receipts from gambling games are subject to a wagering tax.

8. The rate of the wagering tax imposed under § 99F.11 is greater for gambling games at racetrack enclosures than for gambling games at non-racetrack enclosures, to-wit: twenty percent (20%) fixed for non-racetrack enclosures versus twenty-two percent (22%) for racetrack enclosures in calendar year 1997, twenty-four percent (24%) for racetrack enclosures in calendar year 1998, and increasing an additional two percent (2%) per year for racetrack enclosures until the rate is thirty-six percent (36%).

9. Accordingly, RACI's adjusted gross receipts from its gambling games are subject to the higher rate of tax.

10. For the 1997 calendar year, the 22% wagering tax paid by RACI required RACI to pay $2,487,185.00 more than it would have paid at 20% if it were a non-racetrack enclosure. For the 1998-2002 calendar years, the additional wagering taxes which RACI will be required to pay as a racetrack enclosure are estimated as follows:

	Projected Wagering Tax Remittance	Rate	If Capped @ 20%	Difference
1998	$30,730,000	24%	$25,650,000	$5,080,000
1999	33,270,000	26%	25,650,000	7,620,000
2000	35,810,000	28%	25,650,000	10,160,000
2001	38,350,000	30%	25,650,000	12,700,000
2022	40,890,000	32%	25,650,000	15,240,000

11. No rational, nonarbitrary reason exists for taxing adjusted gross receipts from gambling games at a higher rate when those games are conducted at racetrack enclosures, rather than elsewhere.

12. Iowa Code § 99F.11, in imposing a higher rate of taxation on RACI's adjusted gross receipts from gambling games, deprives RACI of due process and of the equal protection of the laws, in violation of the Fourteenth Amendment to the U.S. Constitution.

13. Iowa Code § 99F.11 is inconsistent with the requirements of Article I, § 6 and Article III, § 30 of the Iowa Constitution that laws have a general and uniform operation.

14. Iowa Code § 99F.11 must be declared unenforceable, under both the U.S. and Iowa Constitutions, insofar as it imposes a higher rate of wagering tax on gambling games at racetrack enclosures, and any enforcement or collection of the higher rate of tax must be enjoined.

WHEREFORE, RACI respectfully requests that this Court enjoin Defendant Michael Fitzgerald, Treasurer, State of Iowa, from collecting a wagering tax on adjusted gross receipts on gambling games of RACI other than at a uniform rate as to all gambling games of non-racetrack enclosures, that Defendant be required to remit to RACI any such taxes paid since January 1, 1997 which are higher than the wagering taxes paid by non-racetrack enclosures, that RACI be awarded its costs and attorney fees (to the extent allowed by law) for prosecuting this action, and that RACI be and granted

such other relief as is just and equitable under the circumstances.

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA Defendant.	**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Filed Mar. 27, 2000)

Defendant Michael Fitzgerald hereby makes the following motion for summary judgment pursuant to Iowa R. Civ. P. 237.

1. This case concerns a constitutional challenge to the manner in which the State of Iowa taxes licensed gambling facilities.

2. Plaintiff Racing Association of Central Iowa (RACI) operates a pari-mutuel racetrack known as Prairie Meadows Racetrack and Casino in Altoona, Iowa, pursuant to Iowa Code chapter 99D. (Petitioner, ¶¶ 2,6). Interveners Dubuque Racing Association, Ltd. (DRA) and Iowa West Racing Association (IWRA) operate racetracks in Dubuque and Council Bluffs, respectively.[1] (*See* DRA Petitioner, ¶ 8; IWRA Petitioner, ¶ 7). Intervener Iowa

[1] RACI, DRA, and IWRA will be collectively referred to as "the racetracks" in this motion.

Greyhound Association (IGA) is an organization of greyhound owners that races at DRA and IWRA. (Exhibit 1, Ketterer affidavit).

3. Plaintiffs[2] complain that the racetracks are taxed unfairly vis-a-vis "excursion gambling boats," which are licensed pursuant to Iowa Code chapter 99F.

4. Equal protection challenges are decided using a traditional rational basis standard unless a classification involves a suspect class or a fundamental right. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Bennette v. City of Redfield*, 446 N.W.2d 467, 473 (Iowa 1989).

5. This case does not require strict scrutiny because it does not involve a suspect class nor a fundamental right. Therefore, the court should apply the rational basis test in this case.

6. Summary judgment is appropriate when the record before the court shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Teleconnect v. U.S. West Communications*, 508 N.W.2d 644, 648 (Iowa 1993).

7. This case is susceptible to a motion for summary judgment; in fact, no evidence is necessary to decide the issue whether the statute has as rational basis. *See Gregory v. Ashcroft*, 898 F.2d at 605 (affirming dismissal of an equal protection claim subject to the rational basis

[2] Because the interveners make the same claims as RACI, they will be collectively referred to as "plaintiffs."

test). A differing classification shall be upheld if "any state of facts reasonably can be conceived to justify it." *Currans v. Linn County Civil Service Comm'n*, 540 N.W.2d 469, 472 (Iowa App. 1995); *Knapp v. Tinder*, 183 F.3d 786, 789 (8th Cir. 1999).

8. Plaintiffs have a "staggering burden" to prove that a statute is unconstitutional. *Heritage Cablevision v. Marion County Bd. of Sup'rs*, 436 N.W.2d 37, 38 (Iowa 1989).

9. It is widely recognized that the rational basis standard is easily satisfied in challenges to tax statutes. *Heritage*, 436 N.W.2d at 38.

10. Beyond the deference given to legislatures to distinguish between classes of businesses in tax cases, legislatures are given further deference in making laws regulating gambling. The gambling industry is distinct from almost all other businesses because gambling is an activity which the states may prohibit altogether. *Kelly v. New Hampshire Pari-Mutuel Comm'n*, 499 A.2d 995, 997 (N.H. 1985). "Licensed gambling is a privilege conferred by the state and does not carry with it the rights inherent in useful trades and occupations." *Thomas v. Bible*, 694 F.Supp. 750, 759 (D. Nev. 1988) *aff'd* 896 F.2d 555 (9th Cir. 1989). Gambling remains an illegal activity in Iowa, except as specifically permitted by statute. *State v. Wilt*, 333 N.W.2d 457, 462 (Iowa 1983).

11. The legislature may have had several rational reasons to have different rates on the wagering tax for pari-mutuel racetracks, including the following:

a. Pari-mutuel racetracks and excursion gambling boats are dissimilar classes of businesses.

b. The legislature has an interest in maximizing tax revenues from gambling facilities.

c. The legislature could have reasonably found that it is necessary to maintain a lower wagering tax rate on excursion gambling boats to prevent them from leaving the state.

d. The legislature could have reasonably found that operating a casino on a boat is inherently more limited and burdensome than operating a land-based facility.

e. The legislature could reasonably believe that the tracks should pay a higher wagering tax on its gambling game operation because they have received considerable tax breaks on their pari-mutuel operation.

12. Plaintiffs other constitutional claims should be rejected for similar reasons. *See Knapp v. Hanson*, 183 F.3d 786, 790 (8th Cir. 1999); *Exira Community School Dist. v. State*, 512 N.W.2d 787, 793 (Iowa 1994).

13. Additionally, Treasurer Fitzgerald should be dismissed from this suit because he has no role in enforcing this statute. *See Hatfield v. Williams*, 376 F.Supp. 212, 214 (N.D.Iowa 1974) (citing *Ex Parte Young*, 209 U.S. 123 (1908).

CONCLUSION

Wherefore, Defendant Michael Fitzgerald requests that the Court grant his motion for summary judgment and dismiss this action in its entirety.

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA Defendant.	**DEFENDANT'S STATEMENT OF UNDISPUTED FACTS** (Filed Mar. 27, 2000)

Defendant Michael Fitzgerald, pursuant to Iowa R. Civ. P. 237 hereby sets forth the following statement of undisputed facts in support of his motion for summary judgment.

1. Plaintiff Racing Association of Central Iowa (RACI) operates a pari-mutuel racetrack known as Prairie Meadows Racetrack and casino in Altoona, Iowa, pursuant to Iowa Code chapter 99D. (Petition, ¶¶ 2, 6).

2. Interveners Dubuque Racing Association, Ltd. (DRA) and Iowa West Racing Association (IWRA) operate racetracks in Dubuque and Council Bluffs, respectively.[1] (*See* DRA Petition, ¶ 8; IWRA Petition, ¶ 7).

3. Intervener Iowa Greyhound Association (IGA) is an organization of greyhound owners that races at DRA and IWRA. (Exhibit 1, Ketterer affidavit).

[1] RACI, DRA, and IWRA will be collectively referred to as "the racetracks" in this statement.

4. Plaintiffs[2] complain that the racetracks are taxed unfairly vis-a-vis "excursion gambling boats," which are licensed pursuant to Iowa Code chapter 99F.

5. The authorization and development of the pari-mutuel racetrack and excursion gambling boat industries in Iowa have separate and distinct histories. This history is briefly set forth below.

Pari-mutuel racetracks:

6. Pari-mutuel gambling at racetracks was first authorized in 1983. 1983 Iowa Acts ch. 187. The 1983 legislation authorized qualified nonprofit corporations to apply for licenses to conduct wagering on horse or dog races. Iowa Code § 99D.7; 1983 Iowa Acts ch. 187 § 8. There are no for-profit racetrack licensees in Iowa. (Exhibit 1, Ketterer Affidavit). The only type of wagering permitted was pari-mutuel wagering on the horse or dog races. Iowa Code § 99D.11; 1983 Iowa Acts ch. 187, § 11. No other forms of gambling were permitted at that time. Iowa Code § 99D.2; 1983 Iowa Acts ch. 187, § 3.

7. The 1983 legislation also created the State Racing Commission. 1983 Iowa Acts ch. 187, § 5. The Racing Commission was created to exercise full jurisdiction over and supervise all race meetings governed by Iowa Code chapter 99D. 1983 Iowa Acts ch. 187, § 6. The Racing Commission's duties included investigating applicants for a license to determine who best served the interests of

[2] Because the interveners make the same claims as RACI, they will be collectively referred to as "plaintiffs."

Iowa, adopting standards for race meetings, regulating purse structures, establishing standards for the saliva and urine tests for horses and dogs, establishing fees for saliva and urine testing, prevent animals from racing if in violation of the regulations, withhold purses[3] in disputed races, establishing procedures for hearings regarding challenged races, require licensees to use a computerized totalizator system for calculating odds and payoffs of races, and other duties. 1983 Iowa Acts ch. 187, § 7; *see also* Iowa Code § 99D.7.

8. The Racing Commission began accepting applications for racetracks after the implementation of the 1983 legislation. In July and August of 1984, the Commission granted the following pari-mutuel wagering licenses:

> a) Dubuque Greyhound Association, Ltd., d/b/a Dubuque Greyhound Park in Dubuque. Dubuque Greyhound Park began operations on June 1, 1995.
>
> b) Iowa West Racing Association, d/b/a Bluffs Run in Council Bluffs. Bluffs Run began operations on February 27, 1986.
>
> c) National Cattle Congress, d/b/a Waterloo Greyhound Park in Waterloo. Waterloo Greyhound Park began operations on October 15, 1986.
>
> d) Racing Association of Central Iowa, d/b/a Prairie Meadows in Altoona. Prairie Meadows began its horse racing operations on March 1, 1989.

(Exhibit 2, Commission chronology).

[3] A "purse" is a prize awarded to the place winners of a horse or dog race.

9. The dog racing industry in Iowa initially saw some success. However, as early as 1990, it began to show a significant decline in revenue from pari-mutuel wagering, which is know [sic] as the mutuel handle.[4] The following chart shows the annual mutuel handle at each of the three Iowa dog tracks, from 1989 to 1993:

Year	Waterloo	Council Bluffs	Dubuque
1989	$28,993,917	$105,477,937	$65,165,531
1990	$29,993,917	$77,831,539	$41,219,405
1991	$25,548,278	$66,832,377	$28,179,552
1992	$18,907,332	$57,863,473	$19,867,762
1993	$12,804,286	$42,277,746	$7,398,008

(State's Exhibit 3, Iowa Racetrack Live Statistics).

10. In other terms, during the three year period from 1990 to 1993, Waterloo realized a 57 percent decrease in mutuel handle. Attendance dropped by 47 percent during the same period, even though Waterloo conducted 30 more performances in 1993 than it did in 1990. In the four year period from 1989 to 1993, Council Bluffs realized a 60 percent decrease in mutuel handle. In the same period, Dubuque realized an 89 percent decline in mutuel handle. As a result of these problems, Waterloo Greyhound Park

[4] "Mutuel handle" is the total amount gambled minus the winnings paid patrons.

filed for chapter 11 bankruptcy on December 16, 1993. (Exhibit 2, Chronology).

11. Prairie Meadows, the only horse racetrack in Iowa, saw similar declines in its mutuel handle shortly after it opened in 1989:

Year	Prairie Meadows
1989	$37,948,437
1990	$25,936,603
1991	$17,541,241
1992	$0[5]
1993	$5,362,700

(Exhibit 3, Statistics). Prairie Meadows filed for chapter 11 bankruptcy on November 27, 1991. (Exhibit 2, Chronology). At that time, there was $40 million of unpaid principle payments on the bonds used to build Prairie Meadows facility. *See Standfield v. Polk County*, 492 N.W.2d 648 (Iowa 1992).

Excursion gambling boats:

12. Gambling on excursion gambling boats was first authorized in 1989. 1989 Iowa Acts ch. 67. The 1989 legislation authorized qualified nonprofit corporations to apply for licenses to conduct wagering on gambling games. Iowa Code § 99F.5; 198 [sic] Iowa Acts ch. 67, § 5. The same 1989 legislation also authorized the licensing of the

[5] Prairie Meadows showed no mutuel handle in 1992 because it held no races during that year. (Exhibit 1, Ketterer affidavit).

operator of the excursion gambling boat, which may be a for-profit organization. *See Id.* The 1989 legislation further permits the qualified nonprofit corporation to enter into a management contract with a for-profit company to manage its gambling game operation. Iowa Code § 99F.7(2)(a); 1989 Iowa Acts ch. 67, § 7. Based on these provisions, the practice has been that all excursion gambling boat operators have been for-profit companies, and all have entered into management contracts with the nonprofit licensees to manage the operation of gambling games. (Exhibit 1, Ketterer Affidavit).

13. The 1989 legislation also added responsibilities to the State Racing Commission, which was renamed the Iowa Racing and Gaming Commission. 1989 Iowa Acts ch. 67, § 24. The Commission was also authorized to exercise full jurisdiction over and supervise all gambling operations authorized by chapter 99F. 1989 Iowa Acts ch. 67, § 4; Iowa Code § 99F.4. The Commission's duties under chapter 99F included investigating applicants for a license to determine who best served the interests of Iowa, authorizing the different types of casino games that could be offered, regulating the wagering structure providing for a maximum wager of $5 per wager and maximum loss of $200 per gambling excursion[6], determining the payouts from gambling games, define the duration of an excursion (which must be at least three hours), ensure that licensees recreate riverboats that resemble Iowa's riverboat history, and require licensees to utilize Iowa resources, goods, services, employees, and entertainers. 1989 Iowa Acts ch.

[6] Contrarily, there were no bet or loss limits on pari-mutuel wagering at racetracks. *See* Iowa Code 99D.11.

187, §§ 4, 7; 1989 Iowa Acts ch. 139 § 1; Iowa Code §§ 99F.4, 99F.7 (1989 Supp.).

14. The Commission began accepting applications for excursion gambling boat licensees after the implementation of the 1989 legislation. On March 8, 1990, the Commission granted the following four excursion gambling boat licenses:

> a) Dubuque Casino Belle Inc., d/b/a Dubuque Casino Belle in Dubuque. The Dubuque Casino Belle began operations on April 1, 1992.
>
> b) Steamboat Southeast, Inc., d/b/a Emerald Lady in Burlington, Fort Madison, and Keokuk. The Emerald Lady began operations on May 10, 1992.
>
> c) Steamboat Development Corp., d/b/a Diamond Lady in Bettendorf. The Diamond Lady began operations on April 1, 1992.
>
> d) Connelly Group, L.P., d/b/a President Casino in Davenport. The President began operations on April 1, 1992.

(Exhibit 2, Chronology).

15. The Commission later granted two additional licenses:

> e) On January 17, 1991, the Commission granted an excursion gambling boat license to the Mississippi Belle II in Clinton. The Mississippi Belle began operations on June 12, 1992.
>
> f) On July 2, 1992, the Commission granted an excursion gambling boat license to Missouri Riverboat Corp., d/b/a Sioux City Sue. The Sioux City Sue began operations on January 29, 1993.

(Exhibit 2, Chronology).

16. The excursion gambling boat licensees initially realized some success, but they soon experienced problems which limited profitability. When Iowa adopted its excursion gambling boat legislation, there was no casino gambling in other states. However, on February 7, 1990, Illinois adopted legislation authorizing riverboat gambling in its state. IL Legis. P.A. 86-1029 (Feb. 7, 1990). The Illinois statute authorized the grant of at least four licenses on the Mississippi River, which borders Iowa and Illinois. Ill. Rev. Stat. ch. 120, ¶ 2407(e). As a result, five of the six Iowa excursion gambling boat licensees soon saw direct competition from Illinois. Further, the Illinois statute did not set any limits on the amount that could be bet or loss. *Id.* at ¶ 2411(a)(3). Therefore, an Iowa patron who wanted to make a casino bet of more than $5, or wanted to risk more than $200, could drive across the river and gamble in Illinois.

17. Accordingly, some of the excursion gambling boat licensees moved their operations to other states that did not have bet or loss limits:

> a) In July of 1992, the Diamond Lady ceased operations in Iowa. The excursion gambling boat was transferred for use in another gaming jurisdiction.
>
> b) In July of 1992, the Emerald Lady ceased operations in Iowa. The excursion gambling boat was transferred for use in another gaming jurisdiction.

c) In March of 1993, the Dubuque Casino Belle ceased operations. The excursion gambling boat was transferred for use in another gaming jurisdiction.

(Exhibit 2, Chronology).

Further events leading to the 1994 legislation:

18. By 1993, the Iowa Racing and Gaming Commission was well-aware of the financial problems of the racetracks, and the competition issues facing the excursion gambling boats. Commission David Blair in particular, voiced his concern during public Commission meetings that the legislature was not taking any further action to save the industry in Iowa. (*See* Exhibit 4, Minutes).

19. In response to these concerns, the Commission prepared a supplement to its 1992 Annual Report to the Governor[7] documenting some of the problems. (Exhibit 5). This report referred to the pari-mutuel industry as "an industry in crisis," and noted the adverse effect on excursion gambling boats due to competition from other states and Indian casinos. (Exhibit 5, p. 16). Attachments to the report showed that all four racetracks showed a net loss in 1992. (Exhibit 5, attachments A, C). These attachments also show that attendance at the three excursion gambling boats had gone down. The Commission made no recommendations for legislation, stating that their position as regulators required them to stay neutral. However, the

[7] The Commission is required to submit an annual report to the governor, which could include any legislative changes recommended by the Commission. Iowa Code section 99D.21.

Commission closed its report by stating: "The future of these industries lies in the hands of the legislature and the people of Iowa." (Exhibit 5, p. 16).

20. Thereafter, on August 26, 1993, the Governor appointed Ed Stanek, Director of the Iowa Lottery, and Lorraine May, Chair of the Iowa Racing and Gaming Commission, to head a bi-partisan committee to recommend changes in Iowa's gambling laws. (Exhibit 6). The Committee also consisted of four legislators. The purpose of the Committee was to conduct a detailed study of the gaming industry and make recommendations to retain jobs, while protecting the integrity of gaming in the state. *Id.* The governor stated that there was a need for the Committee because there had been no consensus among legislators as to the steps that should be taken to remedy the problems in the racetrack and excursion gambling boat industry. *Id.*

21. The Gaming Study Committee published a substantial report of its findings and recommendations. (Exhibit 7). The Gaming Study Committee noted several purposes underlying the legislation contained in chapters 99D and 99F, including promoting economic development, increasing jobs, and generating tax revenue. (Exhibit 7, p. 28). Additionally, the Gaming Study Committee noted that the pari-mutuel statute has the additionally [sic] purpose of promoting development of agricultural industries, while the excursion gambling boat industry has the additional purpose of supporting river town development. (Exhibit 7, pp. 28, 30).

22. The Gaming Study Committee made the following recommendations regarding legislation to assist

racetracks and excursion gambling boats within the intent of the original statutes establishing chapters 99D and 99F:

1) To assist excursion gambling boats:

   a) Eliminate the $5 wager limit,

   b) Eliminate the $200 loss limit,

   c) Modify restrictions on the use of space on the boat, and

   d) Modify the cruising requirements.

2) To assist racetracks:

   a) Allow racetracks to operate slot machines, or

   b) Negotiate a revenue sharing agreement with the Indian tribes operating tribal casinos in Iowa.

(Exhibit 7, p. 35).

23. The Gaming Study Committee specifically noted that, if pari-mutuel racetracks are allowed to operate slot machines, they should pay a larger wagering tax than excursion gambling boats:

> Because the land-based casinos could function with a lower operating cost, the state should receive . . . 24% of adjusted gross revenues over three million.

(Exhibit pp. 35-36).

24. On March 31, 1994, the legislature approved amendments to chapters 99D and 99F. In particular, the legislature adopted three provisions consistent with the recommendations of the Gaming Study Committee. First,

the legislature assisted the racetracks by authorizing them to operate slot machines at their facilities. 1994 Iowa Acts ch. 1021, § 13; Iowa Code § 99F.4A. Second, the legislature assisted the excursion gambling boats by eliminating the wager and loss limits. 1994 Iowa Acts ch. 1021, § 19 (*see* Iowa Code § 99F.9(2) (1993)). Third, the legislature adopted a higher wagering tax rate for racetracks, albeit, not the same rate recommended by the Committee. *See* 1994 Iowa Acts ch. 1021, § 25; Iowa Code § 99F.11(1).

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IN THE IOWA DISTRICT COURT IN AND
FOR WARREN COUNTY

COALITION FOR A COMMON CENTS SOLUTION, THOMAS A. PHILLIPS, DANIEL W. FRIEBERG, KATHLEEN R. FRIEBERG, MICHAEL D. MOORE, MIKE STAUDACHER, RENE STAUDACHER, MARK CLARK, MARY CLARK, SUMNER OPSTAD, ELODIE OPSTAD, DEBORAH F. FRANKLIN, GENE L. FRANKLIN, and MARTIN P. MAHER,	:	NO. EQCV026737
Plaintiffs,	:	RULING AND ORDER
vs.	:	
STATE OF IOWA, THOMAS J. VILSACK, as Governor of the State of Iowa, MARY KRAMER, as President of the Iowa Senate, BRENT SIEGRIST, as Speaker of the Iowa House of Representatives, and TED STILWILL, as Director of the Iowa Department of Education,	:	
Defendants.	:	

This matter came on before the Court on August 23, 2002, on Defendants' Motion to Dismiss. Plaintiffs appeared by Attorney, Steven P. Wandro, and Defendants appeared by Assistant Attorney General, Christie J. Scase. Thereupon, the matter proceeded to hearing and the Court having reviewed the court file and having heard the

arguments of counsel makes the following Findings of Fact and Order.

FINDINGS OF FACT

Plaintiffs' petition was filed on April 5, 2002, seeking a declaratory judgment and injunctive relief. Plaintiffs' petition alleges that Chapter 422E of the Iowa Code is unconstitutional. Chapter 422E provides for a local option sales tax. If approved by a majority of voters within a county, the county may charge up to an additional 1 percent sales tax on all retail sales for a maximum of 10 years. Funds generated from the local option sales tax are set aside for school infrastructure within that county.

Plaintiffs allege that this local option sales tax has a disparate impact. They request, in addition to a declaratory judgment, an injunction to prohibit enforcement by the Defendants. Plaintiffs' petition further alleges that Iowa children have a fundamental right to an adequate education under the Iowa Constitution. In the alternative, Plaintiffs argue that this statute has no rational relationship to a legitimate state interest. They claim the impact of the tax is to treat school districts similarly situated in different ways based solely on geography and wealth, i.e. retail sales base. Plaintiffs claim this disparate treatment is unconstitutional.

Defendants' Motion to Dismiss was filed on June 3, 2002, and states that even if all of the allegations in Plaintiffs' petition are true, there is no basis for any right of recovery by Plaintiffs. Defendants specifically state that there is no Constitutional basis which provides a fundamental right to an education in Iowa. Defendants state Chapter 422E is designed to retain local control over the

decision to provide additional funds for school infrastructure. Defendants claim this is a rational basis for the statute which promotes a legitimate state interest.

In the alternative, Defendants allege that even if the action moves forward, the individual named Defendants, including Governor Thomas Vilsack, Mary Kramer as President of the Iowa Senate, Brent Siegrist as Speaker of the Iowa House of Representatives, and Ted Stilwill as Director of the Iowa Department of Education, must be dismissed because there is no claim which would provide a basis for any action against these individuals. Defendants state that Mary Kramer and Brent Siegrist have legislative immunity. In addition, Defendants allege that Governor Vilsack and Ted Stilwill have no specific statutory duty for enforcement of Chapter 422E.

Plaintiffs filed their resistance to the Defendants' Motion to Dismiss on July 9, 2002. Plaintiffs state that the standard required for a motion to dismiss prevents dismissal of the action on its merits. Plaintiffs agree that Mary Kramer and Brent Siegrist have legislative immunity and, therefore, should be dismissed from this action. Plaintiffs allege, however, that Defendants Vilsack and Stilwill should be left in the action in their official capacities.

CONCLUSIONS OF LAW

A motion to dismiss should be granted only if the petition shows no right of recovery under any state of facts. *Rieff v. Evans,* 630 N.W.2d 278, 284 (Iowa 2001); *quoted in Barnes v. State,* 611 N.W.2d 290, 292 (Iowa 2000). Such motion should not be liberally granted by the Court. *Id.* The issue is the right of access to the Court and

not the merits of the allegations. *Rieff* at page 284. Very little is required to survive a motion to dismiss. *Id.* Whether the Plaintiffs will be successful is not the issue before the Court on a motion to dismiss. What is before the Court is whether any statement of the facts will support Plaintiffs' petition. *Rieff* at page 292.

Plaintiffs' petition basically alleges that Chapter 422E creates an inequitable funding mechanism for education which violates the Iowa Constitution. Plaintiffs state that even if an adequate education is not a fundamental right under our state Constitution, Chapter 422E bears no rational relationship to any legitimate State interest. Defendants, on the other hand, argue that education is not a fundamental Constitutional right although it is important. Defendants also claim that local control constitutes a rational basis for the statute which accomplishes a legitimate Sate interest, *i.e.* funding for school infrastructure. If any conceivable basis exists for the statute which is rationally related to a legitimate State interest, the statute is constitutional. Defendants argue that even if the tax scheme is inequitable, the statute itself is constitutional.

Interestingly enough, both parties agree the Iowa Supreme Court has not specifically addressed whether education in Iowa is a constitutionally protected fundamental right. The parties have reached different conclusions regarding that question. The Iowa Supreme Court has stated a student has a due process right to an adequate education. *Exira Community Sch. Dist. v. State,* 512 N.W.2d 787, 796 (Iowa 1994). The Supreme Court did not, however, define what constitutes an adequate education in that case. *Id.*

The Defendants rely on a 1946 Iowa Supreme Court decision to support its position regarding educational funding. *Kleen v. Porter,* 23 N.W.2d 904 (Iowa 1946). That case held that educational funding statutes as then contained in Chapters 133 and 134 of the Iowa Code did not violate Article IX of the Iowa Constitution. In the same ruling, the Iowa Supreme Court overruled a contrary decision dating back to 1862. *Kleen* does not specifically address whether an education constitutes a fundamental right under the Iowa Constitution.

The difficulty for this Court is that even if Defendants are correct that there is no fundamental right to an education in this state, that does not resolve the question as to the rational basis for Chapter 422E. *See, Racing Ass'n of Cent. Iowa v. Fitzgerald,* 648 N.W.2d 555 (Iowa 2002). In that case the Iowa Supreme Court held a taxing mechanism which discriminated between casinos and racetracks was unconstitutional. *Id.* The Court did not address a fundamental right in that case. The Court, however, determined that there was no rational basis for the statute. The Court actually examined the purported basis for the statute. The Court concluded that a review of the alleged basis for the statute indicated that it was not rationally related to a legitimate State interest. *Id.* The Court stated, "Rational basis review of a taxing scheme is not tantamount to no judicial review." *Id.* at 8.

RULING AND ORDER

In the case before this Court, the statute does not set out the legislative basis for the local option sales tax. It would be pure speculation on the part of this Court to

make such a determination at this stage in the proceedings. In addition, the Iowa Supreme Court has not yet had the opportunity to address whether education is a constitutionally protected fundamental right. Applying the appropriate standard for a motion to dismiss, this Court cannot find that there is no version of the facts and/or applicable law which would support Plaintiffs' petition. That portion of Defendants' Motion to Dismiss relating to the merits of Plaintiffs' claim is denied for those reasons.

The remaining portion of Defendants' motion is addressed to the individual named Defendants. Plaintiffs acknowledge that Defendants Mary Kramer and Brent Siegrist have legislative immunity and the court, therefore, should dismiss them from this action. Plaintiffs reluctantly acknowledge that while Governor Vilsack and Director Stilwill may be permissive parties to this action, they are not necessary parties to this action. *See, Warden v. Pataki,* 35 F Supp.2d 354 (S.D.N.Y. 1999). The Court finds that the individual named Defendants are unnecessary to this action. Therefore, all individual Defendants are dismissed and Defendants' motion is granted as to defendants Kramer, Siegrist, Vilsack and Stilwill.

Dated this 8th day of October, 2002.

/s/ Martha Mertz
JUDGE, FIFTH JUDICIAL
DISTRICT OF IOWA

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Counsel of record

Supreme Court, U.S.
FILED
DEC 9 2002
OFFICE OF THE CLERK

No. 02-695

In The Supreme Court of the United States

MICHAEL FITZGERALD, TREASURER, STATE OF IOWA,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

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INTRODUCTION: REASONS FOR DENYING THE PETITION

The Treasurer of Iowa asks this Court to review and overturn a decision by the Iowa Supreme Court invalidating, under both the Iowa and the U.S. Constitutions, a draconian 36 percent adjusted gross receipts tax on slot machine revenues at Iowa racetracks. The tax, which has no precedent elsewhere in the country, arose from an unusual set of circumstances. Iowa's racetracks were going broke. A rescue package was arranged, which included legal authority for these racetracks to install slot machines on their premises. Riverboats already had such authority in Iowa. At the last minute, however, an amendment was added due to the efforts of a riverboat district legislator. The amendment subjected slot machine revenues at racetracks, but not on riverboats, to a maximum 36 percent tax rate rather than the existing 20 percent rate. The Iowa Supreme Court held that this discriminatory tax violated the Equal Protection Clauses of both the Iowa Constitution and the Fourteenth Amendment and struck it down.

There is no basis for this Court to review the Iowa Supreme Court's decision because it rests on adequate and independent state grounds. Its decision was based on the Iowa Constitution, not just the U.S. Constitution, and there is no reason to believe that the Iowa Supreme Court's views on Iowa's Constitution would change regardless of any ruling by this Court. That is especially true when the controversy is centered entirely on Iowa.

Furthermore, even as a matter of federal constitutional law, there is no need to review the Iowa Supreme Court's decision because its analytical framework was

unquestionably correct. That court went through all the proper steps. It rightly characterized the case as a "rational basis test" case, and recognized that the Respondents had a "heavy burden" and had to "negate every reasonable basis upon which to uphold the statute." However, while the rational basis test permits a law to be sustained by "rational speculation," *Heller v. Doe*, 509 U.S. 312, 320 (1993), a law may not be upheld when "the facts preclude[ ] any plausible inference" that an asserted justification was the actual legislative purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992). Citing *Nordlinger*, the Iowa Supreme Court held that this confiscatory and discriminatory tax could not be reconciled with the undisputed legislative purpose of helping the racetracks to recover from economic distress. Accordingly, the tax failed an essential element of the rational basis test.

The Iowa Supreme Court did not engage in improper fact-finding. Nor did it demand that Petitioner affirmatively prove that the discriminatory tax served a legitimate state purpose. Rather, the court simply accepted certain basic undisputed facts from the summary judgment record about the legislative purpose behind the tax and the harmful effects of the tax, such as were considered by this Court in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336 (1989). Based on that irrefutable record, the Iowa Supreme Court found that the facts precluded any inference that promoting riverboats and river towns could have been the legislature's actual purpose for the tax. The Iowa Supreme Court's conclusion was correct. In any event, quarrels about how a state supreme court applied a properly stated

rule of federal constitutional law do not warrant review by this Court. *See* Supreme Court Rule 10.

STATEMENT OF FACTS

I. Introduction.

This case presents questions concerning the constitutionality of a 36 percent adjusted gross receipts tax on slot machines at nonprofit racetracks. That rate is 80 percent higher than the tax rate on the same revenues from the same machines used in the same way on for-profit riverboats. Petitioner's "Statement of the Case" ignores critical undisputed facts that were part of the summary judgment record below, particularly undisputed facts as to legislative history and legislative purpose that were central to the Iowa Supreme Court's decision. The following facts are taken from the summary judgment record and have never been challenged by Petitioner.

II. The Discriminatory Tax.

Iowa law imposes a tax *generally* on the adjusted gross receipts received from gambling games of 5 percent on the first $1 million of adjusted gross receipts annually, 10 percent on the next $2 million of adjusted gross receipts, and 20 percent on any adjusted gross receipts in excess of $3 million. Iowa Code § 99F.11 (first sentence). Prior to 1994, only riverboats could offer gambling games, including slot machines and card games. The revenues from those games were taxed in accordance with the foregoing law at a maximum rate of 20 percent.

In 1994, however, the Iowa legislature enacted H.F. 2179 which legalized slot machines at racetracks, but subjected any "gambling games at racetrack enclosures," beginning January 1, 1997, to a special tax rate that would escalate annually up to 36 percent on adjusted gross receipts in excess of $3 million. The challenged provision, which became the second sentence of Iowa Code § 99F.11, read as follows:

> However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetrack enclosures is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is thirty-six percent.

III. Taxation of Slot Machine Revenues in Other Jurisdictions.

No other state in our nation has such a discriminatory tax. Other states that allow slot machines and/or video lottery terminals generally tax their revenues at an identical rate regardless of where the machine is located. For example, that is true in Montana, Nevada, Oregon, South Carolina, and South Dakota. Louisiana, the only state besides Iowa that authorizes slot machines on riverboats and at racetracks, has a slightly lower tax rate (18 percent vs. 18.5 percent) for slot machines at racetracks. Louis. Rev. Stat. §§ 27:91, 27:393. New Mexico authorizes video lottery terminals at racetracks and in other locations, and its gaming tax is uniformly 25 percent of the "net take." New Mexico Stat. § 60-2E-47. No other state has a tax that is 80 percent higher based solely on the location of the gambling device.

Furthermore, no other state has an adjusted gross receipts tax on gaming revenue that approaches 36 percent. Illinois recently enacted a tax of 35 percent on an entity's annual adjusted gross gaming receipts above $100 million. However, the effective Illinois tax rate is much lower because the 35 percent rate only applies when annual receipts exceed $100 million. 230 Ill. L.C.S. § 13.

IV. The Legislative History of the Discriminatory Tax.

How did this discriminatory tax come about in Iowa? By 1993, all the racetracks in Iowa were experiencing serious financial difficulties. Respondent Racing Association of Central Iowa ("Prairie Meadows") had entered bankruptcy in 1991, had emerged from bankruptcy in 1993, but was continuing to lose money. The racetracks operated in Council Bluffs and Dubuque, respectively, by Respondents Iowa West Racing Association ("IWRA") and Dubuque Racing Association, Ltd. ("DRA") were consistently losing money, and indeed the track in Council Bluffs ("Bluffs Run") was on the verge of insolvency.

Additionally, the Iowa riverboats were being threatened by competition from other states, particularly Illinois, which allowed excursion gambling without Iowa's stringent loss limits of $200 per excursion and $5 per hand or play.

Before the commencement of the 1994 session of the Iowa legislature, a consensus agreement was reached among representatives of the racetrack and riverboat interests and legislators from the affected areas. The consensus legislation provided for (a) slot machines to be authorized at racetracks, (b) the elimination of loss limits

on riverboat gambling, and (c) continuation of the existing 20 percent maximum tax rate on adjusted gross receipts from gambling games. This consensus agreement was set forth in legislation which 12 members of the Iowa House introduced as an amendment to H.F. 2179.

On March 15, 1994, however, a state representative from Woodbury County, a county on the Missouri River which contains a riverboat but no racetracks, offered an amendment that provided for a 40 percent gross receipts tax on gambling games *at racetracks*. Neither he nor any other supporter of the amendment gave any reasons in the House debate for a higher tax on the same machines at racetracks.

On March 17, this representative agreed to have his amendment reconsidered so that the highest rate on gambling games at racetracks would be 36 percent rather than 40 percent of adjusted gross receipts, and to provide a two-year moratorium (*i.e.*, until January 1, 1997) for the higher rate to begin to take effect in order to give racetrack supporters an opportunity to repeal the tax disparity in the next General Assembly.

As so amended, H.F. 2179 passed the Iowa House that day. It later passed the Iowa Senate and was signed by the Governor. The Speaker of the Iowa House, who was a gambling opponent and controlled the House agenda, had made it clear that he would allow H.F. 2179 to be considered only once in the House. Thus, as a practical matter,

any effort to remove the discriminatory tax in the Senate would have defeated the entire legislation.[1]

The Iowa legislature did not amend § 99F.11 in subsequent sessions and, thus, in 1997, the higher tax rate began to phase in. No other activity is taxed by the State of Iowa at a rate of 36 percent. By way of comparison and contrast, Iowa taxes sales of tobacco products at 22 percent. Iowa Code § 453A.43.

V. The Impact of the Discriminatory Tax.

As noted above, each of the Respondents is a nonprofit entity. By Iowa law, these entities are required to distribute *any* net income not used to pay off debts or to supplement horse or dog purses for educational, civic, public, charitable, patriotic or religious uses. Iowa Code § 99F.6(4)(a). As a practical matter, this means that the net income of the Respondents goes back into the community, either through payments to local governments or through charitable contributions.

Respondent Prairie Meadows has distributed over $186 million to Polk County (the county that includes Altoona, where it is located, as well as Des Moines, Iowa's largest city) and over $12 million to various charities from

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[1] In the proceedings below, Respondents submitted several affidavits from Iowa legislators. The district court denied Petitioner's motion to strike the affidavits, noting that they described the background of the legislation but did not offer individual legislators' opinions as to legislative intent or motive. Thus, they were admissible under Iowa law. *See Miller v. Bair*, 444 N.W.2d 487, 488 (Iowa 1989) (court relied on three legislator affidavits).

1995 through 1999. Respondent DRA has distributed over $7.5 million to charities and over $27.5 million to the City of Dubuque. Bluffs Run has distributed over $45 million to various educational, civic and charitable organizations since 1995.

Each of the racetracks continues to lose money today on the racing portion of their operations, and depends on slot machine revenues for survival. However, as the higher tax on gaming revenues from slot machines at Iowa racetracks has phased in, that tax has had a predictably adverse impact on the racetracks. For calendar year 2002, until the Iowa Supreme Court rendered its decision on June 12, the tax rate was 32 percent. Had the Supreme Court not ruled the discriminatory tax unconstitutional, it would have continued to increase by 2 percent each succeeding calendar year until it reached 36 percent in 2004. By 2003 or at the latest 2004, Respondent Prairie Meadows would have had little or no profits to distribute to Polk County and to charities. Meanwhile, Respondent DRA expected a loss on operations which would have necessitated closure of the facility and the loss of its economic and employment benefits. It is also undisputed that Bluffs Run, which competes with riverboats in the same community, is competitively disadvantaged by the disparate gaming tax.

VI. Proceedings in the Iowa Courts.

Respondents originally brought this action in the Iowa District Court for Polk County. They challenged the second sentence of Iowa Code § 99F.11, which established the far higher tax on adjusted gross receipts from slot machines located at racetracks, as unconstitutional on several

grounds. On December 4, 2000, ruling on cross-motions for summary judgment, the district court upheld the discriminatory tax and dismissed Respondents' claims.

Significantly, although Petitioner urged five possible justifications for the discriminatory tax under the rational basis test, including obviously insubstantial justifications like "revenue maximization,"[2] the district court accepted none of the Petitioner's arguments. Instead, it came up with its own justification – that the legislature could have intended that river towns or riverboats receive "a beneficial tax rate" as a means of promoting their interests. *See* Pet. App. 34.

On appeal, the Iowa Supreme Court reversed. To begin with, it noted:

> [T]he heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. . . .

Pet. App. 8.

Critically, the Iowa Supreme Court then pointed out – and Petitioner has never disputed – that the Iowa legislature's undisputed purpose in 1994 was to save the racetracks

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[2] If revenue maximization were a sufficient justification under the rational basis to sustain a tax discrepancy, then every tax disparity would always be constitutional. *Volusia County Kennel Club v. Haggard*, 73 So.2d 884, 886-87 (Fla. 1954) (holding that "the desire to get more money from the race tracks" is insufficient to sustain a tax under the Equal Protection Clause).

from economic distress. Levying an 80 percent higher tax on the revenues from slot machines at racetracks frustrated that goal. Reviewing both the justification developed by the district court and the various justifications advanced by the State, the court concluded that "[e]ach justification ignores the plain fact that this differential tax completely defeats the alleged purpose of the 1994 legislation." Pet. App. 15. The court added:

> At a minimum, the tax frustrates the legislative purpose in permitting racetracks to operate. The legislation goes even further, however, by disabling an industry it was allegedly designed to aid.

Pet. App. 15.

Following the Iowa Supreme Court's June 12, 2002 decision, Petitioner requested rehearing. On August 6, 2002, the court denied the petition for rehearing. This Petition followed.

THE DECISION BELOW RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

The Petition should not be granted because the Iowa Supreme Court's decision rests on adequate and independent state grounds. The Iowa Supreme Court specifically stated that it was invalidating the second sentence of Iowa Code § 99F.11 under both the Iowa Constitution (Art. I § 6) and the Fourteenth Amendment to the U.S. Constitution. Pet. App. 6. Indeed, it cited primarily Iowa precedents, such as *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980), and *Gleason v. City of Davenport*, 275 N.W.2d 431 (Iowa 1979).

While the Iowa Supreme Court "usually" interprets federal and Iowa Equal Protection Clauses the same way, *see Bowers v. Polk County Board of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002); *Krull v. Thermogas Co.*, 522 N.W.2d 607, 614 (Iowa 1994), it has not hesitated to interpret Iowa Const. Art. I, § 6 differently from the Fourteenth Amendment when it disagrees with a precedent of this Court.

Thus, in *Bierkamp*, 293 N.W.2d 577, the Iowa Supreme Court held that Iowa's guest statute, which prohibited guest passengers in an automobile from suing the driver of that automobile for negligence, created an improper classification that violated Iowa Const. Art. I § 6. That court acknowledged that in interpreting the U.S. Constitution, it was bound by prior decisions of this Court upholding guest statutes against Fourteenth Amendment challenges. *Id.* at 579. Indeed, in one of its own decisions, the Iowa Supreme Court had previously held that Iowa's guest statute did not violate the Fourteenth Amendment. *Bietz v. Horak*, 271 N.W.2d 755, 759 (Iowa 1978). Nonetheless, the Iowa Supreme Court emphasized that this Court's Fourteenth Amendment jurisprudence was merely "persuasive," and "not binding," in construing Art. I § 6. Accordingly, it struck down Iowa's guest statute as violative of the Equal Protection Clause in the Iowa Constitution. 293 N.W.2d at 580-85.

As Petitioner points out, this is a case about "Iowa's tax system." These are Iowa issues, affecting Iowa citizens. Because of the state's current budget deficit, the Iowa Supreme Court knew its decision would be controversial to some extent, but it made it anyway. There is no reason to believe that the Iowa Supreme Court's previously expressed views on the constitutionality of Iowa Code

§ 99F.11 *under the Iowa Constitution* would be modified by any decision of this Court concerning requirements of the U.S. Constitution. As the Iowa Supreme Court has said on another occasion, "Unquestionably, this court must determine Iowa constitutional requirements, and in so doing is under no obligation to uphold a local statute merely because the United States Supreme Court has deemed it not unconstitutional." *Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 23 (Iowa 1977).

This case is not *Michigan v. Long*, 463 U.S. 1032 (1983). Unlike the Michigan Supreme Court, the Iowa Supreme Court did not cite exclusively federal cases or give the impression that it "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Id.* at 1043-44. To the contrary, the vast majority of the Iowa Supreme Court's citations were to Iowa precedents. Pet. App. 6-17.

The Iowa Supreme Court has also made it clear, repeatedly, that it views U.S. Supreme Court interpretations of the Fourteenth Amendment as merely non-binding "guidance" in interpreting the Iowa Constitution. *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999); *Putensen v. Hawkeye Bank*, 564 N.W.2d 404, 408 (Iowa 1997); *Huff*, 256 N.W.2d at 23; *Davenport Water Co. v. Iowa State Commerce Comm'n*, 190 N.W.2d 583, 593 (Iowa 1971). As that court has reminded the public on several occasions, "[I]t is the exclusive prerogative of our court to determine the constitutionality of Iowa statutes challenged under our own constitution." *Callender*, 591 N.W.2d at 187; *Putensen*, 564 N.W.2d at 408.

THE IOWA SUPREME COURT'S INTERPRETATION OF THE FOURTEENTH AMENDMENT WAS CONSISTENT WITH THIS COURT'S PRECEDENTS

I. Introduction.

The Petition also should be denied because the Iowa Supreme Court's ruling was correct as a matter of federal constitutional law. The 36 percent tax imposed by the second sentence of Iowa Code § 99F.11 is unique, confiscatory, and discriminatory. The Iowa Supreme Court correctly held that this disparate tax rate on slot machine revenues at racetracks violated the Equal Protection Clause in the Fourteenth Amendment, as well as its counterpart in the Iowa Constitution. There is no rational reason for the same revenues from the same machine used in the same way to be taxed at an 80 percent higher rate because of the machine's location.

Three points should be emphasized at the outset. First, *no* other state taxes slot machine revenues at substantially different rates based on where the slot machine is located. This is significant. As this Court has said in a recent rational basis case, "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

Second, had the discriminatory tax not been struck down by the Iowa Supreme Court, it would have had a dramatic negative impact on nonprofit racetracks, the communities they serve, and the horse and dog racing industry in Iowa. This is a 36 percent revenue tax, not an

income tax. It must be paid "at the pump" whether the racetrack is making money or not.

Third, the tax originated when a single legislator from a riverboat district proposed an amendment to the existing statutory scheme, which had taxed all slot machine gross receipts at the same rate. His amendment added a special discriminatory tax on gambling games at racetracks. It was accepted with a clause postponing its effect so it could be removed in a subsequent legislative session. This removal, however, did not occur. The precedents make clear that this type of legislative history is relevant. While the rational basis test permits a law to be sustained by "*rational* speculation," *Heller v. Doe*, 509 U.S. 312, 320 (1993) (emphasis added), it may not be upheld when "the facts preclude[ ] any plausible inference" that an asserted justification was the actual legislative purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992). "Even the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321.

The Petition filed in this case is a curiosity, for at least two reasons. For one thing, Petitioner never tells this Court what he thinks the rational basis for the tax is. Read pages 11 through 20 of his Petition ("Reasons for Granting the Petition for Certiorari"). Re-read them. You will not see any reference to a supposedly legitimate end that could be served by the second sentence of § 99F.11. It is telling that, at this very late stage in the proceedings, Petitioner still cannot articulate a plausible reason for the statute.

Second, Petitioner never addresses the relevant federal constitutional principles that the Iowa Supreme

Court relied upon in invalidating the statute under the Fourteenth Amendment. We now turn to those principles.

II. The Iowa Supreme Court's Application of This Court's Equal Protection Precedents Was Correct.

In striking down the second sentence of § 99F.11, the Iowa Supreme Court held that, under the rational basis test, an asserted justification for a law that could not have been the legislature's actual goal should not be accepted. As the court put it, "In determining whether the tax statute is constitutional, we must consider whether the asserted purpose behind this tax could have been the genuine goal of the legislation. [Citing *Nordlinger*, 505 U.S. at 15-16.]" Pet. App. at 10.

That proposition is well-enshrined in this Court's constitutional jurisprudence. This case presents the question whether the identical activity – slot machine gaming – can be taxed at widely disparate rates, depending solely on whether the slot machine in question is in a facility on dry land or in a facility that floats. Racetracks and riverboats offer the same product, in the same manner, to essentially the same customers.

To try to defend this discriminatory tax, Petitioner offered in the trial court several possible justifications under the rational basis test. Respondents, meeting their burden, demonstrated that *none* of these justifications met the rational basis test. The trial court evidently agreed, because it came up with a *new* justification not argued by Petitioner – *i.e.*, promotion of riverboats and river towns – and sustained the tax on that basis.

Respondents have always recognized that, in order to prevail, they had to negate all possible justifications given for the tax. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618-22 (1985) (striking down New Mexico law after rejecting both justifications that had been accepted by the New Mexico court). And, Respondents did so. Under this Court's precedents, a justification for a legislative classification is invalid under the rational basis test if it fails to meet any of the following three requirements: (a) legitimate state purpose; (b) reasonable relationship between means and ends; and (c) the purpose could have been a plausible basis for the legislation. This is confirmed by this Court's decisions which embody the following rules:

- To satisfy the rational basis test, the classification must further a legitimate state purpose. For example, in *Hooper*, this Court struck down a New Mexico veteran's tax exemption that distinguished between persons who resided in the state before 1976 and those who did not. That discrimination did not further a legitimate state purpose. 472 U.S. at 623.

- The relationship between the classification and its goal "must not be so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11. There must be a "reasonable" relationship, not a "casual" relationship, between the means and the ends. *Williams v. Vermont*, 472 U.S. 14, 23 n. 8 (1985). For example, in *Williams*, this Court struck down a Vermont law that granted a use tax exemption to residents but not to nonresidents who purchased cars out-of-state. The Court rejected the justification that the exemption prevents unfair double taxation (*i.e.*, taxation by two entities for the use of only one entity's roads) even though the State argued that its residents are more likely to use their vehicles only in Vermont. *Id.* at 33-34 (dissenting opinion). In this Court's view, the means chosen were not sufficiently related to the ends. *Id.* at 25-27. Similarly, in *Romer*, this Court applied the rational basis test to invalidate Colorado's anti-gay rights amendment, rejecting several asserted justifications (such as private citizens' freedom of association) on the ground that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." 517 U.S. at 635.

- Even if the purpose is permissible and the means are not attenuated, that may not be enough. If the party challenging the legislation can show that the asserted "justification" could not actually have been relied upon, then it may not be used to uphold the statute. *Nordlinger*, 505 U.S. at 15-16.

The Iowa Supreme Court duly considered both the justifications that had been advanced by Petitioner and the one that the trial court relied upon. Pet. App. 11-15. In rejecting these justifications, the Iowa Supreme Court cited *Nordlinger* and invoked the third principle noted above.

As this Court said in *Nordlinger*, "[T]his Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Id.* at 15. The *Nordlinger* Court gave *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336 (1989), as an example of a case "where the *facts* precluded any plausible inference" that the asserted purpose for a taxing scheme was the actual purpose. 505 U.S. at 16 (emphasis added). In *Heller*, 509 U.S. 312, 321, this Court reaffirmed that "even the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation."

In other words, while a court is entitled to engage in "rational speculation" concerning the legislature's goal, and that speculation need not be supported by actual evidence, *FCC v. Beach Communications, Inc.*, 408 U.S. 307, 315 (1993), the court may not attribute a purpose to the legislature that the record affirmatively shows *could not have been* the legislature's goal. *Heller*, 509 U.S. at 321; *Nordlinger*, 505 U.S. at 15; *Allegheny Pittsburgh*, 488 U.S. at 345; *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 n. 16 (1975) (also citing cases).

Allegheny Pittsburgh, a tax case, illustrates this point. There, a West Virginia county followed a method of property assessment that resulted in only minor adjustments to assessed value for property tax purposes until a property was sold, at which time a full market-value adjustment would be made. While the Court suggested in *Allegheny Pittsburgh* and confirmed in *Nordlinger* that these property-tax classifications *might have served* a legitimate legislative goal and met the rational basis test in an appropriate case, they did not do so there because relevant legislative sources showed that West Virginia had intended to adopt a true market value approach. In short, the legislation failed the rational basis test because the goal advanced by the government conflicted with the unquestioned legislative goal of a market value method of property assessment. *Allegheny Pittsburgh*, 488 U.S. at 345.

The Iowa Supreme Court correctly held that this was an *Allegheny Pittsburgh*-type of case. The undisputed purpose of the 1994 legislation was "to help the racetracks recover from economic distress." Pet. App. 11. Yet the legislation "also increased the tax on racetrack slots at a rate eighty percent higher than the tax imposed on riverboat slots." *Id.*

One cannot justify such a surtax as a way of promoting riverboats or river towns, as the trial court attempted to do, because such a justification does not comport with "the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321. As noted by the Iowa Supreme Court, the 80 percent higher tax burden on slot machine revenues at racetracks would be a rational way of promoting the riverboat gambling industry only if "the reason for it was to drive the racetracks out of business" – a purpose which conflicts with the unquestioned actual goal of the 1994 legislation. Pet. App. 14. In summary, this is another one of those admittedly rare cases where the discrimination is simply irrational in the context of the undisputed legislative goal.

Because the discriminatory tax did not rationally further a legitimate state purpose, the Iowa Supreme Court correctly held that it violated the Equal Protection Clauses in both the Iowa and U.S. Constitutions. *Allegheny Pittsburgh*, 488 U.S. at 345-46 (striking down discriminatory property tax assessment scheme as violating the Equal Protection Clause); *Hooper*, 472 U.S. at 623 (striking down modest property tax exemption, as violative of the Equal Protection Clause, accorded to Vietnam War veterans who were New Mexico residents before May 1976).

The Iowa Supreme Court also could have rejected the asserted justifications for the disparate tax on the ground that they failed the second of the above three tests. Even if the goal is legitimate, the means chosen must have some *reasonable* relationship to those ends. A relationship that is "far removed," *Romer*, 517 U.S. at 635, 116 S.Ct. at 1629, or "casual," *Williams*, 472 U.S. at 23 n.8, 105 S.Ct. at 2472 n.8, does not work. For example, imposing a confiscatory tax on

racetracks is a very crude and highly indirect way of "promoting" river boats and river towns. That is especially true when two of the three racetracks (DRA and IWRA) are located in river towns.

In summary, the legislative history unmistakably shows that the 1994 law was supposed to be a life preserver for the racetracks, not their last rites. To attribute to the legislature a purpose of driving those same tracks out of existence is irrational and impermissible. Indeed, it violates the teaching of *Allegheny Pittsburgh* and *Nordlinger* that the court may not evaluate the constitutionality of a scheme in light of purposes that are excluded by the legislative history. 488 U.S. at 344-46; 505 U.S. at 16. The Iowa Supreme Court properly struck down the second sentence of § 99F.11 under the Fourteenth Amendment, as well as under Art. I § 6 of the Iowa Constitution.

III. *Central State University* Is Readily Distinguishable From This Case.

Petitioner confuses the situation in *Central State University v. American Assn. of University Professors*, 526 U.S. 124 (1999) (*per curiam*), with the circumstances of the present case. In *Central State University*, the Ohio Supreme Court held that a law authorizing public universities to develop workload standards for professors and exempting those workloads (but not those of other public employees) from collective bargaining violated the Equal Protection Clause of the Fourteenth Amendment. The State had argued that the law was an attempt to address a decline in the amount of teaching performed by professors. However, in the critical passage of its opinion, the Ohio court concluded that

> there is not a shred of evidence in the entire record which links collective bargaining with the decline in teaching over the last decade, or in any way purports to establish that collective bargaining contributed in the slightest to the lost faculty time devoted to undergraduate teaching.

699 N.E.2d 463, 469 (Ohio 1998).

This Court correctly concluded that such an approach violated the rational basis test. As this Court explained, "One of the statute's objectives was to increase the time spent by faculty in the classroom: the imposition of a faculty workload was an entirely rational step to accomplish this objective. . . . The fact that the record before the Ohio courts did not show that collective bargaining in the past had led to the decline in classroom time for faculty does not detract from the rationality of the legislative decision." 526 U.S. at 128.

However, *Central State University* has no bearing on this case. The Iowa Supreme Court did not penalize the Petitioner for failing to offer proof that the second sentence of § 99F.11 actually furthered a legitimate legislative goal. Rather, it did something quite different and entirely appropriate. It reviewed the undisputed facts surrounding the enactment of § 99F.11, and concluded that those facts precluded an argument that the tax differential was intended to promote riverboats or river towns or to further the other asserted justifications for the statute. *See Nordlinger*, 505 U.S. at 16; *Allegheny Pittsburgh*, 488 U.S. at 344-46.

IV. Petitioner's Arguments About Impermissible Fact-Finding Are Unfounded.

Petitioner's assertions about improper fact-finding are unsupported. Petitioner seems to be arguing that a court should never consider evidence in determining the constitutionality of a statute under the rational basis test and should dismiss all such challenges for failure to state a claim. If that were the case, obviously no challenge could ever succeed, yet some do. Moreover, if actual facts are irrelevant, Petitioner fails to explain why he has loaded the appendix to his Petition with material from the summary judgment record. *See* Pet. App. 58-69.

Respondents presented evidence, not disputed or rebutted by Petitioner, which demonstrated there was no rational basis for the dramatically disparate tax treatment of slot machine revenues at racetracks and at riverboats. The facts referred to by the Iowa Supreme Court are fully supported by the record and that court was entitled to consider them. Even now, Petitioner does not deny that the summary judgment record supports the facts that were set forth by the Iowa Supreme Court in its opinion and discussed on pages 15-16 of his Petition. Moreover, even if the Iowa Supreme Court had committed some factual error, and it did not, that would not warrant granting the Petition. *See* U.S. Supreme Court Rule 10.

Lastly, Petitioner's argument that it is improper for a court to consider any post-enactment consequences of a law, regardless of how inevitable or obvious they were when the law was adopted, falls of its own weight. The problem with this argument, of course, is that the discriminatory tax did not take effect immediately. It has been phased in over time and would not have reached 36

percent until 2004. Thus, if Petitioner were right, any legislature could insulate any piece of legislation from constitutional challenge simply by delaying its effect.

Moreover, it is not as if these facts are controversial or should have come as a surprise to anyone. The critical factual points which the Iowa Supreme Court made were that "racetracks must pay drastically more additional tax than riverboats are required to pay" and that the tax "frustrates the racetracks' responsibility to distribute money to local government and charitable organizations" and "to contribute to the overall economy of the State." Pet. App. 12-13. Those facts are self-evident and were as obvious to everyone in 1994 as they are today. They are not, and cannot be, disputed by Petitioner.

THE PETITION DOES NOT MEET THE STANDARDS OF SUPREME COURT RULE 10

This case does not meet the standards of Supreme Court Rule 10. The Iowa Supreme Court did not promulgate a new legal standard. Its discussion of the rational basis test travels through familiar territory. *See, e.g.*, Pet App. 6-7, 10-11. At worst, if the Petitioner's criticisms were correct (and they are not), the Iowa Supreme Court cited the right precedents but then "deviated" from them in deciding this specific case. This Court does not sit for the purpose of correcting such errors.

Seeking to make this case appear more deserving of this Court's review, Petitioner argues that the State is faced with more than $100 million in refunds to Respondents as a result of the Iowa Supreme Court's decision. Petitioner also argues that the Iowa Supreme Court's

decision has led an Iowa trial court, in another case, to refuse to dismiss a lawsuit challenging part of the funding mechanism for Iowa's educational system. *See Coalition for a Common Cents Solution v. State*, No. EQCV26737 (Iowa Dist. Ct. for Warren County, October 8, 2002) (Pet. App. 71-76). Neither of these arguments has anything to do with the considerations for granting certiorari set forth in Supreme Court Rule 10.

To begin with, Petitioner's concerns about tax refunds are overstated. By law, the Respondents are required to disburse any net income they receive for the benefit of Iowans by turning that money over to local governments and charities. *See* Iowa Code § 99F.6(4)(a). Therefore, a broad segment of Iowa's population will benefit from these tax refunds. It is also undisputed that Iowa's state government did not even receive the benefit of racetrack slot machine revenues until the mid-1990's. Even with the Iowa Supreme Court's ruling, it retains all those revenues up to the original 20 percent tax rate. Iowa's state government operated without a share of proceeds from racetrack slot machines for approximately 150 years of its existence. Iowa should be able to manage its fiscal affairs in the future with just a non-discriminatory share of those revenues.

Similarly, Petitioner's arguments about the judicial impact of the Iowa Supreme Court's decision are exaggerated. Petitioner complains that an Iowa district court in Warren County recently refused to dismiss a challenge to part of Iowa's funding mechanism for public education. *See Coalition for a Common Cents Solution*. That is not altogether surprising. Many state supreme courts have found that education is a fundamental right under their state's constitution. *See DeRolph v. State*, 677 N.E.2d 733, 741 n.

6 (Ohio 1997) (citing cases that have invalidated state educational funding systems). As the Warren County district court noted, that question has not been resolved by the Iowa Supreme Court. Pet. App. 74-75. In any event, it appears that at most the Warren County district court may have confused two concepts – (a) approving a legislative purpose that the record affirmatively shows could not have been the legislature's actual purpose (which is what Petitioner asked the courts to do in this case) and (b) engaging in rational speculation as to what the legislative purpose might have been (which is what the Warren County district court was asked to do). Pet. App. 75-76. It is not this Court's role to grant certiorari because an Iowa trial court may have misunderstood an Iowa Supreme Court opinion.

What these arguments really highlight is the insufficiency of Petitioner's grounds for seeking review of this case by this Court. Petitioner's real complaint is that Iowa's judicial branch has issued a ruling that causes some discomfort for its executive and legislative branches. However, concerns of federalism strongly weigh against this Court's involvement in such a controversy. That is particularly true when (as here) the decision rests on adequate and independent state grounds, the tax that was invalidated is *sui generis*, and, in any event, the Iowa Supreme Court properly applied this Court's equal protection precedents.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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No. 02-695

In The
Supreme Court of the United States

MICHAEL FITZGERALD,
Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA,
IOWA GREYHOUND ASSOCIATION,
DUBUQUE RACING ASSOCIATION, LTD. and
IOWA WEST RACING ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Iowa

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SUMMARY OF REPLY ARGUMENT

Respondents' opposition to certiorari confuses the issues before this Court by relying on two false premises: 1) that the sole legislative purpose for enacting a statute authorizing slot machines at racetracks precludes any conceivable rational basis for creating a differential tax rate for racetracks and riverboats; and 2) that an Equal Protection decision by the Iowa Supreme Court based on independent state grounds issued more than twenty years ago precludes jurisdiction in this case.

Respondents and the narrow majority of the Iowa Supreme Court rejected rational bases which would sustain the Iowa statute based on flawed logic: that a statute enacted to help racetracks recover financially could not rationally include a tax differential between racetracks and riverboats on gambling receipts from slot machines. Respondents are better off with slot revenue taxed at a higher rate than with no slot revenue at all. Their misguided reliance on the subjective motive of a single legislator to attack the tax differential only amplifies the error in reasoning. Deducing the legislative purpose of a statute from the remarks of a single legislator is improper.

Respondents' contention that the decision is based on adequate and independent state grounds similarly flows from flawed logic. An Iowa Supreme Court decision issued more than twenty years ago based on adequate and independent state grounds did not preclude jurisdiction in this case. Indeed, Iowa's high court reiterated just today that the Equal Protection Clauses of the United States and Iowa Constitutions are "deemed to be the same 'in scope, import and purpose.'" *Johnson v. Louis*, ___ N.W.2d ___ (Iowa Dec. 18, 2002); *see also Master Builders of Iowa, Inc. v. Polk*

County, 653 N.W.2d 382, 398 (Iowa 2002). Although in *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980), the Iowa Supreme Court decided issues under the state Equal Protection Clause differently from the federal analog, the Court in *Bierkamp* took pains to explain the express departure from federal precedent. *Id.* at 579. Nothing in *Bierkamp* precluded the Iowa Supreme Court, twenty-two years later, from deciding federal and state Equal Protection issues under the same analytic framework.

The decision below conflicts with federal constitutional law and should be reversed.

I. RESPONDENTS CONFUSE LEGISLATIVE INTENT IN ENACTING A STATUTE WITH A RATIONAL BASIS FOR CREATING A TAX DIFFERENTIAL ON GAMBLING RECEIPTS FROM RACETRACKS AND RIVERBOATS.

Respondents' brief in opposition claims an anomaly where none exists. Respondents and a narrow majority of the Iowa Supreme Court take the position that a statute enacted with the legislative intent to help the racetrack industry financially could not on any conceivable rational basis impose a higher tax rate on slot machines at racetracks than on casino games on riverboats. This logic is flawed because a rational legislature could have determined that racetracks would benefit by slot machines, even at a higher tax rate.

This flawed logic underscores the conflict between the Iowa Supreme Court decision and federal precedent on Equal Protection issues. Equal Protection cases are not about construing legislative intent in enacting a statute,

but about searching for any conceivable rational basis to support a legislative classification.

Rather than engaging in "rational speculation" to search for justifications to *uphold* the legislative classification, as required by *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), the majority opinion speculated to find a single purpose for the legislation the court deemed irrational and thereafter disregarded multiple conceivable reasons supporting the tax rate classifications. *See* Pet. App. at 18 (Neuman, J., dissenting).

Respondents' brief in opposition carries this flawed logic forward by relying heavily on the actions of a single legislator to suggest that the legislation was motivated by an improper legislative purpose to harm Respondents. *See* Opposition Brief at 5-7, 14. To derive the legislative purpose of a statute from the words or actions of a single legislator is improper under federal as well as Iowa law. *See Bread Political Action Comm'n v. Fed. Election Comm'n*, 455 U.S. 577, 581 n.3 (1982) (refusing to give weight to affidavits of senator regarding the meaning of statutory language); *Donnelly v. Bd. of Trs. of Fire Ret. Sys. of City of Des Moines*, 403 N.W.2d 768, 771 (Iowa 1987) ("We must look at what the legislature said, rather than what it should or might have said. . . . As we have stated in previous cases, we will not consider a legislator's own interpretation of the language or purpose of a statute. . . ."); *Ruthven Consol. Sch. Dist. v. Emmetsburg Cmty. Sch. Dist.*, 382 N.W.2d 136, 138 (Iowa 1986) (stating "In common with most states we will not consider a legislator's private interpretation of a statute, even if the legislator was actively involved in drafting and enacting the legislation.").

Had the Iowa Supreme Court recognized the legislative purpose of enacting the statute authorizing slot machines at racetracks as providing financial assistance to an ailing industry and not been wrongly focused on the personal motive of an individual legislator, the analytic route to a rational basis for the tax differential would have been apparent. Authorizing slot machines at racetracks gave Respondents a new source of revenue, a virtual goldmine that substantially improved the financial status of the racetracks. This was a bold economic move to help the racetracks. Louisiana is the only state apart from Iowa that has legalized slot machine gaming at both racetracks and riverboat casinos. Iowa Code § 99F.11; La. Rev. Ann. Stat. §§ 27:91, 27:393 (West 2001).

But authorizing this new source of revenue did not constitutionally obligate the State to tax the gambling receipts from the slot machines at racetracks at the same rate as the State taxed the gambling receipts from casino games on riverboats. Expanding gambling to assist the racetracks did not foreclose all rational reasons for taxing the riverboats at a lower rate. The district court wisely found at least three conceivable rational bases for taxing the riverboats at a lower rate: 1) promoting development of river communities; 2) promoting riverboat history; and 3) promoting riverboat casinos as a useful industry. Brief of Petitioners at 9. Only one reason would have been sufficient to satisfy Equal Protection.

The differential tax rate in the Iowa statute is based not simply on the physical location of the gaming device, but also on the class of business providing it, and there is nothing unconstitutional about taxing different classes of businesses with different cost structures at different rates.

II. RESPONDENTS' RELIANCE ON ISOLATED IOWA SUPREME COURT PRECEDENT DOES NOT UNDERMINE JURISDICTION OF THE UNITED STATES SUPREME COURT.

Respondents attempt to parlay the Iowa Supreme Court's decision in *Bierkamp* to thwart federal jurisdiction in this Petition for Certiorari. On the rare occasions when the Court has departed from federal precedent in construing the state constitution, the Court has taken pains to explain why. *See, e.g., Bierkamp,* 293 N.W.2d at 579.

In sharp contrast, the decision below embarked on no separate analysis of the equal protection claims under state and federal law. Rather, the Court applied the same analysis to both as it had in every other Iowa equal protection decision cited therein. To the contrary, the Court expressly stated that the "same analysis" applied to both state and federal equal protection claims. Pet. App. at 6. This Court has not hesitated to review and reverse an erroneous state supreme court equal protection ruling expressly decided under both the federal and state constitutions, when, as here, the state court applies the same analysis to both. *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124 (1999).

The majority cites *Bierkamp* only once, in a passing reference to a general proposition of equal protection law, and without noting *Bierkamp* was decided under the state constitution. Moreover, every other Iowa decision relied upon by the majority expressly adjudicated federal equal protection claims. The absence of any *Bierkamp*-style separate analysis in the decision below confirms that the majority meant what it said in stating the "same analysis"

applied to Respondents' federal and state equal protection claims.

Accordingly, the inescapable conclusion is that the decision below – like that of the Ohio Supreme Court in *American Ass'n of Univ. Professors* – was based on an erroneous holding of federal law, reversal of which necessarily reverses the state constitutional adjudication based on the same analysis.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the Iowa Supreme Court reversed.

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Respondents.

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INTEREST OF AMICI CURIAE

The City of Bettendorf, Iowa and The City of Davenport, Iowa ("the Cities"), Amici Curiae,[1] have a special interest in supporting the Petition for Writ of Certiorari. The Cities depend on state revenue sharing, and the decision below wreaks havoc with the State's budget by mandating a tax refund exceeding $100 million and the loss of over $40 million annually in future tax revenues. The Cities will suffer the effect of the resulting budget crisis. The fiscal crisis likely will be exacerbated as numerous other state tax statutes are challenged based on the Iowa Supreme Court's erroneous interpretation of federal equal protection law. Accordingly, the Cities urge this Court to review and correct the decision below.

SUMMARY OF ARGUMENT

The issue on Petition for a Writ of Certiorari is whether the Equal Protection Clause permits the State of Iowa to tax the revenue from all casino games, including slot machines, on floating riverboats at a rate lower than that imposed on slot machines at land based racetracks. For the reasons that follow, this Court should grant a writ of certiorari and hold that the Iowa Supreme Court erred in finding an Equal Protection Clause violation.

First, the court's decision opens the floodgates to equal protection challenges to numerous other tax statutes. Such

[1] Pursuant to Supreme Court Rules 37.4 and .6, no motion for leave to file this brief is required, as this brief is submitted on behalf of a city by its authorized law officer.

challenges threaten the operating budgets of state and municipal governments.

Second, the Iowa Supreme Court's decision conflicts with this Court's precedent mandating "rational basis" review of equal protection challenges to tax statutes. Because no fundamental right or suspect class is at issue, federal law requires that the legislature be given broad leeway under the rational basis test in determining the classes affected by tax legislation. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (citing *Williams v. Vermont*, 472 U.S. 14, 22 (1985)). When, as here, the classification is rationally related to a legitimate state end, the legislation is to be upheld as constitutional. *Id.* The Iowa legislature was entitled to tax water based and land based casino revenues at different rates for multiple reasons.

Third, this Court may grant Certiorari to correct a state court ruling misconstruing the federal constitution when, as here, there is no adequate and independent state law ground for the judgment below. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). The Iowa Supreme Court applies the same analysis in reviewing equal protection claims under both the federal and Iowa constitutions. Accordingly, reversal of its erroneous federal ruling necessarily reverses the judgment below.

ARGUMENT

I. The Decision Below Opens the Floodgates to Equal Protection Challenges to Numerous State Tax Laws.

This Court has traditionally given considerable deference to the States in designing their tax systems.

This deference comes from recognition of the authority of State legislatures to consider numerous factors in setting taxes, including economic incentives to promote or discourage certain types of activities, incentives to encourage development, and other economic, historic, and geographic factors. This Court has specifically recognized that, because of these various factors, legislatures can set different tax rates for revenues derived from the same types of services provided by different classes of taxpayers. *See Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 358 (1973).

The decision of the Iowa Supreme Court turns this tradition on its head. By holding that tax rates on slot machines at land-based race tracks must be the same as tax rates on all gaming operations, including slot machines, at riverboat casinos, the Iowa Supreme Court has disregarded or misapprehended longstanding precedent. If this Court denies certiorari, it would essentially allow the Iowa Supreme Court to nullify *Lehnhausen*, and require the Iowa legislature to tax equally all businesses offering a particular service regardless of any independent economic, historic or geographic considerations. The result: endless litigation over legislative line-drawing in tax statutes. Litigation has already been filed in *Coalition for a Common Cents Solution v. Iowa*, No. EQCV26737 (Iowa Dist. Ct. October 8, 2002) (Pet. App. at 71-76) challenging the constitutionality of Iowa Code Chapter 422E, a local option sales tax. The opinion below opens numerous other statutes to challenge. The *Coalition* lawsuit is only the first of many anticipated challenges to the legislature's enactment of differential tax rates.

For example, the following Iowa statutes could face equal protection challenges under the Iowa Supreme

Court's new analysis. *See* Iowa Code §§ 422.5(j)(2) (providing the benefit of apportionment to the taxable income of resident shareholders of S Corporations, but not partners, shareholders or members of partnerships, C Corporations or limited liability companies); 422.45(21) (providing an exemption from the tax imposed on the sale of tangible personal property for "printers" engaged in the sale of certain printing materials, but no similar exemption for other businesses selling the same printing materials); 422.45(27) (providing an exemption on the gross receipts from the sale of "computers used in the processing or storage of data or information by an insurance company, financial institution, or commercial enterprise," but not for computers used for processing or the storage of data by a profession, occupation or nonprofit organization); H.F. 2622, 79th Gen. Assem., Reg. Sess. (Iowa 2002) (providing for the abatement of "unpaid sales and use taxes and local sales and services taxes owed by any foundry located in Lee or Jefferson county on the purchase of tangible personal property used by the foundry in making patterns, molds, or dies which purchases occurred between July 1, 1997" and May 6, 2002, without abating taxes on foundries located in other counties).

This litigation quagmire should be averted by this Court's reversal of the decision below. The potential ramifications from this case are not confined to Iowa. If the decision of the Iowa Supreme Court is allowed to stand as a valid interpretation of the Equal Protection Clause, it will serve as support for similar challenges to other states' tax schemes as well. As this Court's precedents have made clear, the line-drawing in these tax schemes should be performed by legislatures, not courts, and the Iowa court's decision in this case must be corrected.

II. The Iowa Supreme Court's Majority Opinion Conflicts with this Court's Precedent.

In the area of "economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a reasonable basis for the classification*." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). So long as a "plausible reason" exists for the legislative action, no further inquiry should occur. *Id.* at 313-14. Further, classifications which do not involve a suspect class or fundamental right are afforded a strong presumption of validity. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Thus, a classification will "not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequity." *Id.* at 321.

The Respondents' burden was to negate "every conceivable basis which may support 'the legislative reason for the enactment.'" *Beach Communications*, 508 U.S. at 315. The Petitioner advanced several reasonable bases for the differential tax. The district court agreed that Respondents "failed to negate every conceivable basis for upholding the taxing statute." Pet. App. at 5. The Iowa Supreme Court majority not only performed independent factfinding, but improperly considered how post-enactment economic events purportedly contradicted the alleged legislative purpose. *Id.* at 8-9; 12-13. The majority seized on one of many possible purposes for the legislation – "to help the racetracks recover from economic distress" – and concluded the state flunked the rational basis test because the higher tax rate hurt the racetracks financially in subsequent years. *Id.* at 10-13.

The majority ignored the legislature's judgment that the racetracks were better off with slot machine revenue (albeit more heavily taxed) than without any slot machine revenue at all. Iowa's decision to give racetracks the authority to operate slot machines was unprecedented at the time – no state in the country had ever taken such action. The racetracks jumped at the opportunity and have made hundreds of millions of dollars as a result. This case displays a perfect example of legislative responsibility: attempt to balance the interests of the racetracks, riverboats, local communities, the State treasury, and anti-gambling groups, to find a way to best promote the interests of the citizens of the State as a whole.

In essence, the majority substituted its policy judgment for that of the legislature. Such a substitution violates rational basis review. *See Hodel v. Indiana*, 452 U.S. 314, 331, 333 (1981) (noting that in substituting its policy judgment for that of the legislature, the court acted as a superlegislature and improperly passed "on the wisdom of congressional policy determinations").

The purpose of rational basis review is to determine whether a reason for the differential tax treatment is plausible at the time the statute was enacted, not whether such a legislative purpose remains valid years later. The legislature is not a soothsayer, and it is inappropriate for the court to review a statute using hindsight. The Iowa court's majority essentially concocted a "back to the future" test in which it second-guessed legislative policy choices in light of subsequent events. This standard is unworkable and subjects a broad array of statutes to equal protection challenge.

At the time the statute was enacted, a rational legislator could have found a number of valid reasons to tax riverboat casino and racetrack slot revenue differently. The majority below disregarded the admonitions of this Court in *Beach Communications*:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of "legislative facts" explaining the distinction "[o]n the record," has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and ability to function."

508 U.S. at 315 (quoted citations omitted).

The dissent below correctly recognized several valid reasons the legislature could have had for taxing gaming revenue from riverboat casinos at a different rate than the land-based racetracks:

> Riverboats are not the same as racetracks. From an entertainment perspective, they speak to different cultural traditions – river lore versus agriculture. The majority questions these distinctions once gaming is attached to the enterprise. But there is no constitutional impediment to a legislature favoring diversity in cultural attractions for its citizens and tourists. And, rightly or wrongly, a legislative majority could rationally

> determine that a riverboat casino holds more romantic tourist appeal than a casino stuck in a dog track.
>
> To advance these policy decisions, a reasonable legislature would also want to recognize a very pragmatic distinction between the two gambling venues: riverboats are mobile, racetracks are not. If the economic climate turns unfavorable here, a riverboat merely unties its lines and sails elsewhere. So it is not unreasonable for the legislature to create economic incentives to develop or retain riverboat gambling while maintaining the status quo with respect to other forms of the sport.

Pet. App. at 18 (Neuman, J., dissenting). Legislators also could have chosen to favor riverboat casinos over land-based slot machine parlors because the former draw a larger number of tourists from border states. In addition, rational legislators could have considered the fact that water-based casinos have significantly higher operating costs than land-based racetracks.[2]

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[2] Floating riverboat casinos are subject to extensive government regulation, including additional equipment requirements, such as availability and maintenance of personal flotation devices, visual distress signals, markings and ventilation equipment; increased documentation and certification and inspection of equipment, hull, boilers and machinery; and increased manning requirements including a master, mates, pilots, engineers, radio and staff officers, and seamen. *See generally*, 33 C.F.R. § 175.1 et seq. (2000) (equipment requirements); 46 C.F.R. § 15.101 et seq. (1999) (crew manning requirements); 46 C.F.R. § 67.1 et seq. (1999) (documentation of vessel requirements); 46 C.F.R. § 71.01 et seq. (1999) (inspection and certification requirements). In addition to these federally mandated requirements, floating casinos incur additional practical operational costs associated with fuel

(Continued on following page)

The majority concluded that the goal of raising revenue "is not rationally served by a taxing scheme that discriminates against certain slot machines simply because of their geography." *Id.* at 14. This conclusion conflicts with this Court's precedent. Geography can indeed play a role in determining the economic or fiscal status of a person or organization to permit differing tax rates. *See Hodel*, 452 U.S. at 333 (holding legislation providing different coal mining restrictions based on geographic location did not violate equal protection clause; "[a] claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70-71 (1978) (stating the Equal Protection Clause does not prohibit legislation merely because it limits its application to a particular geographical region of a state).

Moreover, the majority erred by holding the same activity performed by different classes of business cannot be taxed at different rates. This Court has duly noted that "where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 358 (1973). In *Lehnhausen*, this Court upheld an Illinois taxing statute which imposed a higher tax on property owned by corporations than that same property owned by individuals. In reversing the Illinois Supreme

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consumption, higher insurance rates due to the risk of sinking, and increased costs associated with compliance with the laws of multiple jurisdictions.

Court, this Court specifically noted the words of Mr. Justice Holmes in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 403 (1928):

> If usually there is an important difference of degree between the business done by corporations and that done by individuals, I see no reason why the larger business may not be taxed and the small one disregarded, and I think it would be immaterial if here and there exceptions were found to the general rule. . . . Furthermore, if the State desired to discourage this form of activity in corporate form and express its desire by a special tax, I think that there is nothing in the Fourteenth Amendment to prevent it.

Lehnhausen, 410 U.S. at 361 (quoting *Quaker City Cab*, 277 U.S. at 403 (Holmes, J., dissenting)). Further, in *Lehnhausen*, this Court quoted at length *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), in which the Court stated:

> It could not be said . . . that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. . . . It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals.

Lehnhausen, 410 U.S. at 361-62 (quoting *Flint*, 220 U.S. at 161-62). Thus, this Court has long recognized that states can tax at different rates revenue from the same service provided by different classes of businesses. The majority opinion below erred in holding that the state tax scheme violated the Equal Protection Clause by levying a higher rate on land-based casinos than that levied on riverboat casinos floating on the state's border rivers.

The majority opinion is strikingly out of step with federal Equal Protection jurisprudence and cries out for reversal.

III. No Adequate and Independent State Ground Supports the Iowa Supreme Court's Decision.

There is no impediment to this Court reviewing the Iowa Supreme Court's decision, even though that decision considered, in part, the Iowa Constitution. This Court may grant certiorari if no adequate and independent state ground exists for the holding below. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). This Court will assume "there are no independent state grounds when it is not clear from the opinion itself that the state court relied on an adequate and independent state ground and when it fairly appears the state court rested its decision primarily on federal law." *Id.* at 1042 (concluding that references to state constitution did not constitute independent state ground for that decision).

No adequate and independent state ground exists to support the decision below. The Iowa Supreme Court has repeatedly held that the Iowa and federal equal protection clauses are deemed "to be identical in scope, import and purpose." *Bowers v. Polk County Bd. of Supervisors*, 638

N.W.2d 682, 689 (Iowa 2002); *Exira Cmty. Sch. Dist. v. Iowa*, 512 N.W.2d 787, 792 (Iowa 1994). Further, Iowa's high court applies the "same analysis" to state equal protection claims as is applied to federal claims. *Bowers*, 638 N.W.2d at 689; *Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Prods., Inc.*, 522 N.W.2d 607, 614 (Iowa 1994); *Bruns v. Iowa*, 503 N.W.2d 607, 609 (Iowa 1993); *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 557 (Iowa 1980). Indeed, the decision below reiterated, "Iowa courts are to 'apply the same analysis in considering the state equal protection claims as ... in considering the federal equal protection claim.'" Pet. App. at 6 (quoting *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000)). Every Iowa equal protection case cited in the decision below reached the same conclusion.[3]

This Court has not hesitated to grant certiorari and reverse a state supreme court decision expressly based on both federal and state equal protection grounds when, as here, the state's high court applies the same analysis in construing the state constitution and misinterpreted federal precedent. In *American Ass'n of University Professors v. Central State University*, 699 N.E.2d 463 (Ohio 1998), the Ohio Supreme Court held that a state statute

[3] *See Bowers*, 638 N.W.2d at 689 (holding the same analysis applies to federal and state equal protection claims); *Morrow*, 616 N.W.2d at 547 (Iowa 2000) (same); *Fed. Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 156 (Iowa 1988) (same); *Bierkamp v. Rogers*, 293 N.W.2d 577, 580 (Iowa 1980) (noting the standard for equal protection review stems from federal law); *Gleason v. City of Davenport*, 275 N.W.2d 431, 435 (Iowa 1979) (stating an unreasonable classification which lacks a reasonable relationship to a legitimate state interest violates both state and federal constitutions).

violated the equal protection clauses of *both* the State and Federal Constitutions, *id.* at 470, just as the Iowa Supreme Court did in the case at bar. The Ohio Supreme Court, just like Iowa's high court, applies the same analysis in determining whether a statute allegedly offending the federal Equal Protection also violates the state constitution. *Id.* at 467 ("These two provisions are functionally equivalent, and the standards for determining violations of equal protection are essentially the same under state and federal law.") This Court, concluding that the Ohio Supreme Court had misinterpreted federal law, reversed per curiam. *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124 (1999). Just as this Court found no independent state ground precluding review in that case, it should grant the Petition for a Writ of Certiorari here.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the Iowa Supreme Court reversed.

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No. 02-695

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL FITZGERALD, Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Iowa

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER OF STATE OF IOWA, and GERALD BAIR, DIRECTOR OF IOWA DEPARTMENT OF REVENUE AND FINANCE, Defendants.	EQUITY NO. 36601 **APPLICATION TO INTERVENE BY IOWA GREYHOUND ASSOCIATION** (Filed Feb. 9, 1999)

The Iowa Greyhound Association respectfully applies to intervene in the above-captioned matter for the reasons following:

1. The Iowa Greyhound Association (IGA) is a non-profit Iowa corporation with its home office in Underwood, Pottawattamie County, Iowa.

2. Defendant Gerald D. Bair is Director of the Iowa Department of Revenue and Finance, an administrative agency of the State of Iowa established to lay and collect taxes.

3. Defendant Michael Fitzgerald is Treasurer of the State of Iowa. The Treasurer has the duty to uphold the fiscal laws of the State and receives the wagering tax imposed by Iowa Code Section 99F.11

4. Pursuant to Iowa Code § 99F.6(4)(b), Plaintiff negotiates annually with the greyhound racetrack enclosures in the state to determine the percentage of gambling game proceeds ("win") which shall be dedicated to supplement the purses of live race dogs.

5. The supplements are negotiated as a percentage of win after tax.

6. Any increase in taxes at the state's greyhound racetrack enclosures decreases the tracks' win after tax, and devalues the supplement percentage.

7. Any increase in taxes at the state's greyhound racetrack enclosures decreases the profitability of the tracks generally and accordingly reduces purse amounts.

8. The Fourteenth Amendment to the Unites [sic] States Constitution provides that persons may not be deprived of "life, liberty, or property without due process of law."

9. Plaintiff's interest in the amount of purse income its members receive represents a constitutionally protectable property interest.

10. Governmental infringement of this property right requires that the government action be rationally related to a legitimate government interest.

11. The differential tax treatment imposed in Iowa Code § 99F.11 on racetrack enclosures versus all other gambling game venues authorized under that chapter is not rationally related to a legitimate government interest.

12. This tax based on graduated gross receipts, imposed in Iowa Code § 99F.11, is not rationally related to a legitimate government interest.

13. The purses of Iowa Greyhound Association members are based largely on win after tax at greyhound racetrack enclosures.

14. Win after tax at greyhound racetrack enclosures is reduced by the provisions of Iowa Code § 99F.11.

15. Iowa Code § 99F.11 represents an arbitrary deprivation of the IGA members' property interests on its face and as applied.

16. The Fourteenth Amendment to the Unites [sic] States Constitution states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

17. Iowa Code § 99F.11 creates classifications based on the amount of adjusted gross receipts realized at venues operating gambling games.

18. The statute creates classifications based on status as a racetrack enclosure as opposed to all other venues of gambling games.

19. Gambling licensees who may be identical in all relevant respects, including overall profitability, may nonetheless be taxed at different rates under the statute.

20. The classifications created by the statute are not rationally related to any legitimate government purpose.

21. Article III, § 30 of the Constitution of the State of Iowa provides that all laws for the assessment and collection of taxes for state, county, or road purposes shall be general and of uniform operation throughout the state.

22. Iowa Code § 99F.11 singles out only the three state racetrack enclosures to pay successive two percent per year tax increases.

23. This legislation directed specifically at racetrack enclosures violates the prohibition of special legislation set out in Article III, § 30 of the Constitution of the State of Iowa.

24. Article I, § 6 of the Constitution of the State of Iowa states: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens."

25. Iowa Code § 99F.11 imposes differential tax treatment on racetrack enclosures versus all other gambling game venues authorized under that chapter.

26. The statute imposes differential tax treatment based on adjusted gross receipts.

27. The general statute does not operate uniformly, but rather imposes severe tax burdens on only certain members of the same class of citizens.

28. Iowa Code § 99F.11 violates Article I, § 6 of the Constitution of the State of Iowa.

29. The IGA seeks a judgment which will find and declare Iowa Code § 99F.11 violative of the United States and Iowa Constitutions on its face and as applied, appropriately enjoin its enforcement, award lost revenues, and award the costs of this action to the IGA, along with reasonable attorney fees.

30. The IGA's claim and the claim of Plaintiff RACI have numerous questions of law and fact in common.

31. The interests of the IGA and RACI are closely aligned in this matter.

32. Intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

ACCORDINGLY, the Iowa Greyhound Association respectfully requests that the Court grant its Application to Intervene.

RESPECTFULLY SUBMITTED BY: THE CRAWFORD LAW FIRM

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IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, and DUBUQUE RACING ASSOCIATION, LTD.,	)	EQUITY NO. 36601
Plaintiffs,	)	
v.	)	
MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, and GERALD BAIR, DIRECTOR OF IOWA DEPARTMENT OF REVENUE AND FINANCE,	)	
Defendants.	)	

PETITION OF INTERVENER/PLAINTIFF, DUBUQUE RACING ASSOCIATION, LTD.

(Filed Jul. 23, 1999)

COMES NOW Plaintiff, Dubuque Racing Association, Ltd., by and through its attorneys, O'Connor & Thomas, P.C., and for cause of action against Defendants, states:

1. Dubuque Racing Association, Ltd. ("DRA"), is an Iowa not-for-profit corporation formed pursuant to Chapters 99D and 99F of the Iowa Code.

2. DRA is a tax-exempt organization pursuant to section 501(c)(4) of the Internal Revenue Code.

3. DRA's principal place of business is Dubuque Greyhound Park & Casino in Dubuque, Iowa.

4. Defendant, Michael Fitzgerald, is the Treasurer of the State of Iowa.

5. Defendant, Gerald Bair, is Director of the Iowa Department of Revenue and Finance, an administrative agency of the State of Iowa established to lay and collect taxes.

6. The Treasurer of the State of Iowa has the duty to uphold and enforce the fiscal laws of the State of Iowa and, as relevant to this proceeding, receives the wagering taxes imposed by Iowa Code § 99F.11.

7. In this action, DRA seeks relief under §§ 1983 and 1988 of Title 42 of the United States Code, the Fourteenth Amendment to the United States Constitution, and Article I § 6 and Article III § 30 of the Iowa Constitution.

8. DRA is licensed by the Iowa Racing and Gaming Commission to operate and does operate a racetrack enclosure casino, known as Dubuque Greyhound Park & Casino, a parimutuel dog racetrack enclosure, pursuant to Chapter 99F.4A of the Iowa Code. Net proceeds of the operation are distributed to tax-exempt charitable organizations and to local government.

9. Pursuant to Iowa Code § 99F.11, adjusted gross receipts from DRA's casino operations are subject to the wagering taxes imposed by Iowa Code Chapter 99F.

10. The rate of the wagering tax imposed on the adjusted gross revenues from casino operations at a racetrack enclosure under § 99F.11 are significantly higher than the wagering tax imposed on the same revenues from riverboat casino operations, and the differential in tax rates is scheduled to increase. Gaming taxes imposed on DRA and other casinos operated at racetrack

enclosures in calendar year 1997 were 22% of adjusted gross revenues, compared to 20% of adjusted gross revenues from casino operations on riverboats. Gaming taxes imposed on DRA and other casinos operated at racetrack enclosures in calendar year 1998 were 24% of adjusted gross revenues, compared to 20% of adjusted gross revenues from casino operations on riverboats. Gaming taxes imposed on DRA and other casinos operated at racetrack enclosures in calendar year 1999 are 26% of adjusted gross revenues, compared to 20% of adjusted gross revenues from casino operations on riverboats. The tax rate on adjusted gross revenues from casino operations at racetrack enclosures is scheduled to increase two percent (2%) each and every year following 1999 until the tax rate reaches 36% (in the year 2004); no change is scheduled for the 20% tax rate on adjusted gross revenues from riverboat casinos.

11. DRA and other operators of casinos at racetrack enclosures currently pay a tax rate on adjusted gross revenues from casino operations that is 20% higher than the tax rates paid by riverboat casinos on adjusted gross revenues from gambling operations. When the gaming tax differential is fully implemented in the year 2004, DRA and other casino operations at racetrack enclosures will pay a tax rate on adjusted gross revenues from casino operations that is 80% higher than the tax rates paid by riverboat casinos on adjusted gross revenues from gambling operations.

12. DRA has paid wagering taxes pursuant to Iowa Code § 99F.11 that are in excess of those which would have been paid if DRA were a riverboat casino operation commencing January 1, 1997, continuing to the present, and with the differential in rates increasing each year.

The amounts of additional gaming taxes which DRA will be required to pay from 2000 to 2004, and thereafter, compared to what it would pay if it were taxed at the 20% rate applicable to riverboat casino grambling operations, will continue to increase.

13. No rational basis exists for taxing gambling games at racetrack enclosure casinos at higher rates than for gambling games on a riverboat casino. The differential gaming taxes are arbitrary, unreasonable, and capricious.

14. Iowa Code § 99F.11, to the extent it imposes higher taxes on the gambling operations of a racetrack enclosure casino than upon a riverboat casino, violates the due process and equal protection rights of DRA and other racetrack enclosure casinos, in violation of the Fourteenth Amendment to the United States Constitution.

15. Iowa Code § 99F.11, to the extent it imposes higher taxes on the gambling operations of a racetrack enclosure casino than upon a riverboat casino, violates the requirements in Article I § 6 and Article III § 30 of the Iowa Constitution that Iowa laws have a general and uniform operation.

16. Iowa Code § 99F.11 must be declared unenforceable, under both the United States and Iowa Constitutions, and enforcement or collection of the excess gaming taxes imposed upon DRA and other racetrack enclosure casinos must be enjoined.

WHEREFORE, Plaintiff, Dubuque Racing Association, Ltd., respectfully requests that the Court enjoin Defendants from collecting a wagering tax on adjusted gross receipts on gambling games of DRA at any rate higher than that applicable to riverboat casino operations,

that Defendants be required to remit to DRA any such taxes paid since January 1, 1997 to the extend [sic] they were assessed as a rate higher than 20% of adjusted gross revenues, that DRA be awarded its costs and attorneys fees to the extent allowed by law for prosecuting this action, and that DRA be granted such other or further relief to which it may be entitled.

DUBUQUE RACING
ASSOCIATION, LTD.,
Plaintiff

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	EQUITY NO. 36601 **APPLICATION TO INTERVENE BY IOWA WEST RACING ASSOCIATION** (Filed Sep. 7, 1999)

The Intervenor/plaintiff, Iowa West Racing Association ("IWRA"), comes before this Court and respectfully applies to intervene in the above-captioned matter, pursuant to Iowa Rule of Civil Procedure 75, for the following reasons:

1. IWRA is an Iowa not-for-profit corporation formed pursuant to Ch. 99D and 99F of the Iowa Code.

2. IWRA is a taxable "C" corporation pursuant to the Internal Revenue Code.

3. IWRA's principal place of business is Bluffs Run Casino in Council Bluffs, Iowa.

4. IWRA is licensed by the Iowa Racing and Gaming Commission to operate and does operate a racetrack enclosure casino, known as Bluffs Run, a parti-mutuel racetrack enclosure, pursuant to Ch. 99F.4A of the Iowa Code. Net proceeds of the operation are distributed to

tax exempt charitable organizations and to local government.

5. Pursuant to Iowa Code § 99F.11, adjusted gross receipts from IWRA's casino operations are subject to the wagering taxes imposed by Iowa Code Ch. 99F.

6. The rate of the wagering tax imposed on the adjusted gross revenues from casino operations at a racetrack enclosure under § 99F.11 are significantly higher than the wagering tax imposed on non-racetrack enclosures, and this differential in tax rates is scheduled to increase. Gaming taxes imposed on IWRA and other casinos operated at racetrack enclosures in the calendar year 1997 were twenty-two percent (22%) of adjusted gross revenues, compared to twenty percent (20%) of adjusted gross revenues for non-racetrack enclosures. Gaming taxes imposed on IWRA and other casinos operated at racetrack enclosures in the calendar year 1998 were twenty-four percent (24%) of adjusted gross revenues, compared to twenty percent (20%) of adjusted gross revenues for non-racetrack enclosures. Gaming taxes imposed on IWRA and other casinos operated at racetrack enclosures in the calendar year 1999 are twenty-six percent (26%) of adjusted gross revenues, compared to twenty percent (20%) of adjusted gross revenues for non-racetrack enclosures. The tax rate on adjusted gross revenues from casino operations at racetrack enclosures is scheduled to increase two percent (2%) each and every year following 1999 until the tax rate reaches thirty-six percent (36%) (in the year 2004); no change is scheduled for the twenty percent (20%) tax rate on adjusted gross revenues for non-racetrack enclosures.

7. IWRA and other operated casinos at racetrack enclosures current [sic] pay a tax rate on adjusted gross revenues from casino operations that is twenty percent (20%) higher than the tax rates paid by non-racetrack casinos on adjusted gross revenues from gambling operations. When the gaming tax differential is fully implemented in the year 2004, IWRA and other casino operations at racetrack enclosures will pay a tax rate on adjusted gross revenues from casino operations that is eighty percent (80%) higher than the tax rates paid by non-racetrack casinos on adjusted gross revenues from gambling operations.

8. IWRA has paid wagering taxes pursuant to Iowa Code § 99F.11 that are in excess of those which would have been paid if IWRA were a non-racetrack casino operation commencing January 1, 1997, continuing to the present, and with the differential in rates increasing each year. The amounts of additional gaming taxes which IRWA will be required to pay from 200 to 2004, and thereafter, compared to what it would pay if it were taxed at the twenty percent (20%) rate applicable to non-racetrack casino gambling operations will continue to increase.

9. IWRA has legally cognizable interest in the outcome of the present litigation as it effects IWRA, the plaintiff and the other intervenors.

10. IWRA seeks to intervene to protect its legally cognizable interest in the issues before the Court in this matter.

11. IWRA seeks to intervene on the side of the plaintiff and the other intervenors.

12. IWRA's petition for intervention is attached and sets forth IWRA's position and the relief it seeks.

WHEREFORE, Iowa West Racing Association requests that this Court grant its application to intervene in this matter on the side of the plaintiff and other intervenors.

BRADSHAW, FOWLER,
PROCTOR & FAIRGRAVE,
P.C.

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ATTORNEYS FOR IOWA WEST
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IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	EQUITY NO. 36601 **PETITION OF INTERVENOR/ PLAINTIFF IOWA WEST RACING ASSOCIATION**

The Intervenor/plaintiff, Iowa West Racing Association ("IWRA"), comes before this Court and requests that it be allowed to intervene in this matter pursuant to Iowa Rule of Civil Procedure 75 for the following reasons:

1. IWRA is an Iowa not-for-profit corporation formed pursuant to Ch. 99D and 99F of the Iowa Code.

2. IWRA is a taxable "C" corporation pursuant to the Internal Revenue Code.

3. IWRA's principal place of business is Bluffs Run Casino in Council Bluffs, Iowa.

4. Defendant, Michael Fitzgerald, is the Treasurer of the State of Iowa.

5. The Treasurer of the State of Iowa has the duty to uphold and enforce the physical laws of the State of

Iowa and, as relevant to this proceeding, receives the wagering taxes imposed by Iowa Code § 99F.11.

6. In this action, IWRA seeks relief under §§ 1983 and 1988 of Title 42 of the United States Code, the 14th Amendment to the United States Constitution, and Art. 1, § 6 and Art. 3, § 30 of the Iowa Constitution.

7. IWRA is licensed by the Iowa Racing and Gaming Commission to operate and does operate a racetrack enclosure casino, known as Bluffs Run, a pari-mutuel racetrack enclosure, pursuant to Ch. 99F.4A of the Iowa Code. Net proceeds of the operation are distributed to tax exempt charitable organizations and to local government.

8. Pursuant to Iowa Code § 99F.11, adjusted gross receipts from IWRA's casino operations are subject to the wagering taxes imposed by Iowa Code Ch. 99F.

9. The rate of the wagering tax imposed on the adjusted gross revenues from casino operations at a racetrack enclosure under § 99F.11 are significantly higher than the wagering tax imposed on non-racetrack enclosures, and this differential in tax rates is scheduled to increase. Gaming taxes imposed on IWRA and other casinos operated at racetrack enclosures in the calendar year 1997 were twenty-two percent (22%) of adjusted gross revenues, compared to twenty percent (20%) of adjusted gross revenues for non-racetrack enclosures. Gaming taxes imposed on IWRA and other casinos operated at racetrack enclosures in the calendar year 1998 were twenty-four percent (24%) of adjusted gross revenues, compared to twenty percent (20%) of adjusted gross revenues for non-racetrack enclosures. Gaming taxes imposed on IWRA and other casinos operated at

racetrack enclosures in the calendar year 1999 are twenty-six percent (26%) of adjusted gross revenues, compared to twenty percent (20%) of adjusted gross revenues for non-racetrack enclosures. The tax rate on adjusted gross revenues from casino operations at racetrack enclosures is scheduled to increase two percent (2%) each and every year following 1999 until the tax rate reaches thirty-six percent (36%) (in the year 2004); no change is scheduled for the twenty percent (20%) tax rate on adjusted gross revenues for non-racetrack enclosures.

10. IWRA and other operated casinos at racetrack enclosures current [sic] pay a tax rate on adjusted gross revenues from casino operations that is twenty percent (20%) higher than the tax rates paid by non-racetrack casinos on adjusted gross revenues from gambling operations. When the gaming tax differential is fully implemented in the year 2004, IWRA and other casino operations at racetrack enclosures will pay a tax rate on adjusted gross revenues from casino operations that is eighty percent (80%) higher than the tax rates paid by non-racetrack casinos on adjusted gross revenues from gambling operations.

11. IWRA has paid wagering taxes pursuant to Iowa Code § 99F.11 that are in excess of those which would have been paid if IWRA were a non-racetrack casino operation commencing January 1, 1997, continuing to the present, and with the differential in rates increasing each year. The amounts of additional gaming taxes which IRWA will be required to pay from 2000 to 2004, and thereafter, compared to what it would pay if it were taxed at the twenty percent (20%) rate applicable

to non-racetrack casino gambling operations will continue to increase.

12. No rational basis exists for taxing gambling games at racetrack enclosure casinos at higher rates than for gambling games at a non-racetrack casino. The differential gaming taxes are arbitrary, unreasonable, and capricious.

13. Iowa Code § 99F.11, to the extent it imposes higher taxes on the gambling operations of a racetrack enclosure casino than upon a non-racetrack casino, violates the due process and equal protection rights of IWRA and other racetrack enclosure casinos, in violation of the 14th Amendment of the United States Constitution.

14. Iowa Code § 99F.11, to the extent it imposed higher taxes on the gambling operations of a racetrack enclosure casino than upon a non-racetrack casino, violates the requirements of Art. 1, § 6 and Art. 3, § 30 of the Iowa Constitution that Iowa laws have a general and uniform operation.

15. Iowa Code § 99F.11 must be declared unenforceable, under both the United States and Iowa Constitutions, and enforcement or collection of the excess gaming taxes imposed by IWRA and other racetrack enclosure casinos must be enjoined.

WHEREFORE, Intervenor/Plaintiff, Iowa West Racing Association, respectfully requests that the Court enjoin Defendants from collecting a wagering tax on adjusted gross receipts on gambling games of IWRA at any rate higher than that applicable to non-racetrack casino operations, that Defendants be required to remit

to IWRA any such taxes paid since January 1, 1997 to the extend they were assessed at a rate higher than twenty percent (20%) of the adjusted gross revenues, that IWRA be awarded it's [sic] costs and attorney fees to the extend [sic] allowed by law for prosecuting this action, and that IWRA be granted such other and further relief to which it may be entitled.

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ATTORNEYS FOR
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IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA Defendant	Equity No. 36601 **AFFIDAVIT OF JACK KETTERER**

I, Jack P. Ketterer, being duly sworn on oath, hereby state as follows:

1. I am the present administrator of the Iowa Racing and Gaming Commission (the Commission). The administrator is responsible for the day-to-day operations of the Commission. The administrator is also required by statute to maintain the books, records and documents of the Commission. I have been the administrator since May of 1993. I also previously served as the administrator of the Iowa Racing Commission from 1983 to 1988.

2. Many records held by the Commission are considered official public records. These documents include: a) Chronology of the Commission, b) Iowa Racetrack Live Racing Statistics, c) Minutes, January 19-20, 1994, Meeting of the Commission, d) Supplement to the 1992 Annual Report, e) Announcement of Appointment of Gaming Study Committee, f) Gaming Study Committee Report, and g) 1999 Fiscal Year Revenue Report.

3. The Commission is the state agency responsible for the supervision and regulation of licensed pari-mutuel racetracks and excursion gambling boats. As the administrator, I supervise the Commission's employees involved in the regulation of racetracks and excursion gambling boats.

4. There are significant differences between the licensing of a racetrack and an excursion gambling boat. Racetrack licenses can only be held by nonprofit companies. No for-profit company has ever held a pari-mutuel wagering license in Iowa.

5. There are three current racetrack license holders: a) Dubuque Racing Association in Dubuque, b) Iowa West Racing Association in Council Bluffs, and c) Racing Association of Central Iowa in Altoona (RACI). The National Cattle Congress also formerly operated a racetrack in Waterloo. Each of these licensees are nonprofit companies.

6. Pari-mutuel wagering is a system of wagering in which the gamblers make bets on horses or dogs with the chance of winning the pool of money bet on the race. The "mutuel handle" is the total amount bet on the race. The racetrack is allowed to "take out" a certain percentage of the amount bet, as prescribed by the statute. The "take out" is the amount retained by the racetrack as revenue.

7. The racetracks offer "purses" to owners of horses and dogs who compete in races. The "purse" is the total prize money paid to the top finishers of the race. The amount of the purse varies based on the type of race. The Commission is required by statute to regulate the purse structure and establish minimum purses.

8. The Iowa Greyhound Association (IGA) is an organization of Iowa greyhound owners that race at

Dubuque and Council Bluffs. The IGA is involved in the negotiation of purses paid at both tracks.

9. The racetracks also offer pari-mutuel wagering on simulcast races from other tracks. The original legislation in 1983 did not permit simulcasting, but the legislature amended the statute beginning in 1989 to allow simulcast wagering. Simulcasting was beneficial to the racetracks because the cost of a simulcast race is considerably less than expensive than holding a live race.

10. The racetracks pay a wagering tax on live and simulcast horse and dog races. Greyhound racetracks also receive tax "set asides" on some or all of their tax if they use the amount of the "set aside" for debt retirement, operating expenses, capital improvement, or charitable donations. Horse tracks only pay pari-mutuel tax on mutuel handle greater than $90 million. RACI has never paid any pari-mutuel wagering tax.

11. Each racetrack is required to hold a specified number of live races and racing days to maintain its authority to conduct simulcast races. However, in 1992, the legislature granted a one year exception to that law. RACI took advantage of that exception, and continued to offer pari-mutuel wagering on simulcast races even though it did not offer any live races during that year.

12. The 1994 legislature granted racetracks the authority to operate "gambling games." However, the legislature amended the definition of "gambling game" to provide that racetracks could not offer "table games of chance or video machines." Under this definition, racetracks cannot conduct many traditional table casino games, such as blackjack, roulette, poker, and craps. They also cannot offer video versions of table games such as

video poker. Racetracks can now offer gambling on traditional reel-type slot machines and video facsimiles.

13. Excursion gambling boats are licensed pursuant to a two license system. One license is issued to a nonprofit company to conduct gambling games. A second license is issued to a for-profit company to operate the boat. The nonprofit licensee may enter into a management contract with the for-profit licensee to manage its gambling game operation. In practice, all nonprofit excursion gambling boat licensees have entered into management contracts with the for-profit companies. As a result, each excursion gambling boat in Iowa is owned and managed by a for-profit company.

14. Excursion gambling boats can offer all gambling games approved by the Commission, with the exception of gambling on sporting events. The Commission has approved many games, including blackjack, craps, roulette, poker, slot machines, electronic gaming devices, and others. Excursion gambling boats cannot offer wagering on horse or dog races.

/s/ Jack P. Ketterer
Jack P. Ketterer

Subscribed and sworn to before me on this 20th day of March, 2000.

[SEAL]	JULIE D. HERRICK MY COMMISSION EXPIRES 6-29-2001	/s/ Julie D. Herrick Notary Public in and for the State of Iowa

CHRONOLOGY OF THE IOWA RACING AND GAMING COMMISSION

In May of 1983, the Iowa Legislature passed the Pari-Mutuel Wagering Act allowing qualified sponsoring organizations to apply for a license to conduct pari-mutuel wagering on horse and dog racing. The Governor signed the bill and subsequently appointed the first Racing Commission on July 1, 1983. The Act provided for a Commission consisting of five members each serving a staggered three-year term. The Commission appoints an Administrator for a four-year term, responsible for the daily operations of the Commission.

July 18, 1984, the Commission:

- Granted a conditional three-year license to the Racing Association of Central Iowa for thoroughbred racing in Bondurant.
- Granted a conditional license to Nakoni Park, Inc. for horse racing in Cedar Rapids.
- Granted a conditional three-year winter season greyhound racing license to the National Cattle Congress, who began operations on October 15, 1986 as Waterloo Greyhound Park in Waterloo.
- Granted a three-year seasonal greyhound racing license to the Dubuque Racing Association, Ltd, who began operations on June 1, 1985 as Dubuque Greyhound Park in Dubuque.
- Denied a license to Council Bluffs Greyhound Association for greyhound racing in Council Bluffs.

- Denied a license to Southwest Iowa Racing Association for greyhound racing in Shenandoah.
- Denied a license to West Liberty for the Muscatine County Fair for greyhound racing in West Liberty.

August 28, 1984, a three-year conditional license was granted to Iowa West Racing Association for greyhound racing in Council Bluffs. This facility opened on February 27, 1986 as Bluffs Run.

At the expiration of each initial three-year license, live racing dates were approved annually in June of each year.

December 20, 1984, Racing Association of Central Iowa's petition to change the location of their proposed thoroughbred facility from Bondurant to Altoona was approved. This facility opened on March 1, 1989 as Prairie Meadows.

March 15, 1985, a three-year license was granted to the Iowa Horse Racing Association, Ltd., for pari-mutuel harness racing at various county fair locations throughout the state.

(1985 locations – Cedar Rapids, Des Moines, Denison, Nashua, Humboldt, What Cheer and Monticello; 1986 locations – Des Moines, Cedar Rapids, Humboldt, Keokuk, Denison, Spencer, and Monticello; 1987 locations – Des Moines, Humboldt and What Cheer and 1988 locations – Des Moines, Keokuk and What Cheer)

July 11, 1985, a conditional three-year license was granted to the Cedar Rapids Horse Racing, Inc. in Cedar Rapids. On January 14, 1986, the license was voluntarily surrendered.

July 14, 1987, a license was denied to the Heartland Association for a horse track in Hiawatha and a renewal license was granted to Racing Association of Central Iowa.

July 1, 1989, legislation was enacted, allowing pari-mutuel wagering on simulcast races received by a licensed pari-mutuel facility conducting a minimum number of live performances. Simulcasting is the telecasting of live audio and visual signals of parimutuel races received from an authorized racing facility for the purpose of pari-mutuel wagering.

July 1, 1989, legislation was enacted allowing the Commission to license qualified sponsoring organizations to conduct gambling games on excursion gambling boats in a county where the electorate approves a proposition by referendum.

Excursion boat gambling referendums held in 1989:

- August 15 Clayton County (failed)
- August 15 Dubuque County (approved)
- August 22 Lee and Des Moines Counties (approved)
- August 29 Scott, Muscatine and Clinton Counties (approved)
- September 5 Jackson County (approved)
- September 26 Woodbury County (approved)

March 8, 1990, the Commission granted excursion boat gambling licenses to the following entities (Qualified Sponsoring Organization/Excursion Boat Operator):

- Dubuque Racing Association/Dubuque Casino Belle Inc., who began operation on April 1, 1991 as the Dubuque Casino Belle in Dubuque.
- Southeast Iowa Regional Authority/Steamboat Southeast, Inc., who began operation on May 10, 1991 as Emerald Lady, serving Burlington, Ft. Madison and Keokuk.
- Riverbend Regional Authority/Steamboat Development Corporation, who began operation on April 1, 1991 as the Diamond Lady in Bettendorf.
- Riverboat Development Authority/The Connelly Group. L.P., who began operation on April 1, 1991 as the President in Davenport.
- Missouri River Historical Development, Inc./ Missouri Riverboat Associates, L.P. in Sioux City. After failing to secure financing, their license was revoked by the Commission October 1, 1990.

November 27, 1990, an excursion boat gambling license was granted to the Missouri River Historical Development, Inc./Steamboat Sioux City Inc., who voluntarily surrendered their license on March 26, 1992.

January 17, 1991, an excursion boat gambling license was granted to the Clinton County Gaming Association/ Mississippi Belle II, Inc., who began operation on June 12, 1991 as the Mississippi Belle II in Clinton.

November 27, 1991, Prairie Meadows filed for Chapter 11 Bankruptcy. The Final Order was issued on May 17, 1993 bringing them out of Bankruptcy.

May of 1992, legislation was enacted removing the live performance requirement for simulcast wagering at parimutuel facilities. In 1994, that legislation was amended requiring at least sixty performances of nine live races each day of the season in order for simulcasting to occur.

Excursion boat gambling referendums were approved on August 20, 1991 in Allamakee County and on October 15, 1991 in Clayton County.

During 1992, the Director of the Department of Inspections and Appeals negotiated three Native American Indian tribal gaming compacts for the Governor. The Commission has no regulatory or oversight responsibility for the compacts.

- The Winnebago Tribe of Nebraska began operation of WinnaVegas Casino near Sloan on April 30, 1992.
- The Omaha Tribe of Nebraska began operation of CasinOmaha near Onawa on June 22, 1992.
- The Sac and Fox Tribe of the Mississippi in Iowa began operation of Meskwaki Bingo and Casino near Tama on December 31, 1992.

In July of 1992, the licensees serving Bettendorf and Burlington/Ft Madison/Keokuk ceased operations leaving three operating excursion boat licensees in Iowa.

July 2, 1992, a three year license was granted to the Missouri River Historical Development, Inc./Missouri Riverboat Corp., who began operation as the Sioux City Sue in Sioux City on January 29, 1993.

An excursion boat gambling referendum was approved on November 3, 1992 in Polk County.

In March of 1993, the licensee serving Dubuque ceased operation leaving three operating excursion boat licensees in: Clinton, Davenport and Sioux City. However, that same month a license was granted to the Dubuque Racing Association/Greater Dubuque Riverboat Entertainment Company, L.C., who began operation as the Diamond Jo Casino in Dubuque on May 18, 1994.

September 16, 1993, an excursion boat license was denied to Summit Riverboat Casinos Sioux City, Inc./Missouri River Historical Development, Inc.

December 16, 1993, Waterloo Greyhound Park filed for Chapter 11 Bankruptcy. The Final Order issued on June 26, 1996 brought them out of Bankruptcy.

January 20, 1994, an excursion gambling boat license was granted to the Southeast Iowa Regional Riverboat Corporation/Catfish Bend Casinos L.C., who began operation as Catfish Bend Casino in Burlington/Ft. Madison on November 16, 1994.

Legislation was enacted in March of 1994:

- Removing the $200/day loss limit and the maximum $5/hand wager.
- Requiring an additional local referendum in counties already authorized for excursion boat gambling to allow for unlimited wagers and removal of the loss limits.
- Raising the age restriction for wagering from 18 to 21 (persons 18 and older may be employed in a gambling area).

- Allowing for certain gambling games at racetrack enclosures existing on January 1, 1994 subject to a local referendum.
- Changing the minimum passenger capacity of an excursion gambling boat from 500 to 250 persons.
- Eliminating the requirement that no more than 30% of the square footage of the vessel be used for gambling.
- Requiring that if a proposition to operate gambling games on an excursion gambling boat or at a racetrack enclosure is approved by a majority of the county electorate voting on the proposition, the board of supervisors shall submit the same proposition at the general election held in 2002 and, unless the operation of gambling games is not terminated earlier, at the general election held at each subsequent eight-year interval.
- Allowing for the use of nickels and quarters for wagering.
- Eliminating the prohibition against gambling while dockside.
- Changing the wagering tax to fund the Gambler's Treatment Program from five percent to three-tenths of one percent of the adjusted gross revenue.
- Removing boarding restrictions and allowed the Commission to set the minimum number of excursions and excursion times.
- Allowing licensees to conduct gambling on a 24 hour a day basis.

Gambling game referendums were held in the following counties in 1994:

• May 10	Clinton and Clayton Counties (approved)
• May 17	Lee, Des Moines, Woodbury, and Scott (approved) Dubuque and Pottawattamie (approved both racetrack and boat)
• May 17	Black Hawk (racetrack enclosure – failed)
• July 12	Jackson (approved)
• September 27	Black Hawk (racetrack enclosure – failed)
• November 8	Polk (excursion boat failed and racetrack enclosure approved)

Excursion gambling boat licensees began unlimited gambling in June of 1994.

May 11, 1994, a lease agreement and a stock sale agreement between Sioux City Riverboat Corporation, Inc. and Iowa Gaming Company were approved.

November 4, 1994, excursion gambling boat licenses were granted to the Marquette Gaming Corporation/Gamblers Supply Management Company, who began operation as the Miss Marquette on December 26, 1994 in Marquette and to the Missouri River Historical Development Inc./ Belle of Sioux City, L.P., began operation as the Belle of Sioux City on December 1, 1994 in Sioux City. The Sioux City Riverboat Corporation ceased operation at that time.

In 1996, Marquette Gaming Corporation changed its name to Upper Mississippi Gaming Corporation.

January 18, 1995, an excursion gambling boat license was granted to Riverbend Regional Authority/Lady Luck Bettendorf, L.C., who began operation as Lady Luck on April 21, 1995 in Bettendorf. It had been approximately three years since Bettendorf was last served by a riverboat.

January 20, 1995, excursion gambling boat licenses were granted to Iowa West Racing Association/Harvey's Iowa Management Company, Inc., who began operation as Harveys Casino Hotel on January 1, 1996 and Iowa West Racing Association/Ameristar Council Bluffs Inc., who began operation as Ameristar Casino on January 19, 1996, both located in Council Bluffs. Four licenses were denied in the Council Bluffs area:

President Riverboat Casino-Carter Lake, Inc./Pottawattamie County Gaming Association; Boomtown Iowa, L.C./Iowa West Racing Association; Iowa Par-A-Dice, L.P./Iowa West Racing Association; and Abbott L.C.-MOM Inc./Pottawattamie County Gaming Association.

In July of 1995, legislation was enacted requiring the Commission to cooperate with the gamblers assistance program and to incorporate information regarding the program and its toll-free telephone number in printed materials distributed by the Commission. It also provided that, as a condition of licensing, the Commission could require licensees to have the information available in a conspicuous place.

An excursion boat gambling referendum was approved on February 28, 1995 in Clarke County.

February 28, 1995, a gambling games racetrack enclosure license was granted to Iowa West Racing Association, who began operation as Bluffs Run Casino on March 15, 1995 in its Council Bluffs facility.

Also on February 28, 1995, a gambling games racetrack enclosure license was granted to Racing Association of Central Iowa, who began operation as Prairie Meadows Racetrack and Casino on April 1, 1995 in its Altoona facility.

July 20, 1995, a gambling games racetrack enclosure license was granted to Dubuque Racing Association, who began operation as Dubuque Greyhound Park and Casino on November 22, 1995 in its Dubuque facility.

July 20, 1995, an excursion gambling boat license was denied for Clarke County Development Corporation/ Argosy of Iowa, Inc. in Osceola.

November 16, 1995, the racing dates of February 25, 1995 – April 21, 1996 were denied to the National Cattle Congress. On January 30, 1996, the racing dates of February 14 – April 21, 1996 were denied and on March 7, 1996, a pari-mutuel wagering license was denied for the National Cattle Congress. Operations ceased at Waterloo Greyhound Park on July 13, 1996 in Waterloo.

April 18, 1996, an excursion gambling boat license was denied for ILLIAMO/Midwest in Keokuk.

June 20, 1996, SODAK Gaming Inc. Was approved to purchase the Gamblers Supply Management Company, the licensed excursion gambling boat operator at Marquette.

An excursion boat gambling referendum failed on November 5, 1996 in Dallas County.

April 8, 1997, an excursion gambling boat license was denied for Clarke County Development Corporation/ Argosy of Iowa, Inc. in Osceola.

A second excursion boat gambling referendum was approved on November 18, 1997, in Clarke County.

November 20, 1997, an excursion gambling boat license was granted to Clarke County Development Corporation/ Southern Iowa Gaming Company, who is anticipated to begin operation as Lakeside Casino and at Osceola in the second quarter of 1999.

Currently, there are nine excursion gambling boats, three racetrack enclosures and three Native American Indian Casinos operating in Iowa.

IOWA RACETRACK LIVE RACING STATISTICS

		1985	1986	1987	1988	1989	1990
Prairie Meadows (1985-1988 indicates Harness Circuit Only)	Number of Performances	30	31	26	22	170	139
	Taxable Attendance	49,634	42,796	32,565	34,897	453,287	338,612
	Mutuel Handle	$2,052,406	$2,056,671	$1,986,459	$2,251,285	$37,948,437	$25,936,603
	Breakage	$24,078	$24,522	$19,374	$21,160	$386,976	$203,381
	Unclaimed Winnings	N/A	N/A	$10,119	$9,970	$130,423	$95,051
	State Pari-Mutuel Tax	(1) $102,620	(3) $102,834	(5) $99,323	(7) $112,564	$0	$0
	City/County Pari-Mutuel Tax	(2) $0	(4) $0	(6) $0	(8) $0	$0	$0
Bluffs Run	Number of Performances	N/A	377	412	457	456	447
	Taxable Attendance	N/A	1,128,203	1,131,725	1,107,106	970,150	776,676
	Mutuel Handle	N/A	$122,475,778	$123,255,538	$122,165,062	$105,477,937	$77,831,539
	Breakage	N/A	$455,565	$454,970	$443,282	$379,565	$297,682
	Unclaimed Winnings	N/A	$432,748	$428,968	$463,478	$356,195	$298,817
	State Pari-Mutuel Tax	N/A	$6,123,789	$6,162,777	$6,108,253	$5,273,897	$3,891,577
	City/County Pari-Mutuel Tax	N/A	$1,224,758	$1,232,555	$1,221,651	$1,054,779	$778,315
Dubuque Greyhound Park	Number of Performances	198	236	232	240	238	244
	Taxable Attendance	569,407	645,212	589,317	581,865	541,115	347,560
	Mutuel Handle	$41,690,178	$63,644,286	$65,773,036	$66,892,630	$65,165,531	$41,219,405
	Breakage	$237,970	$237,721	$228,620	$232,638	$205,892	$120,263
	Unclaimed Winnings	$257,508	$240,093	$296,965	$290,015	$301,996	$207,319
	State Pari-Mutuel Tax	$2,084,509	$3,182,214	$3,288,652	$3,344,631	$3,258,277	$1,648,776
	City/County Pari-Mutuel Tax	$416,902	$636,443	$657,730	$668,927	$651,655	$412,194
Waterloo Greyhound Park	Number of Performances	N/A	N/A	213	234	222	224
	Taxable Attendance	N/A	N/A	322,294	291,733	238,814	245,725
	Mutuel Handle	N/A	N/A	$27,433,354	$32,427,585	$28,993,917	$29,607,297
	Breakage	N/A	N/A	$108,641	$106,299	$91,153	$81,864
	Unclaimed Winnings	N/A	N/A	$134,620	$235,944	$136,473	$153,660
	State Pari-Mutuel Tax	N/A	N/A	$1,371,668	$1,621,379	$869,818	$888,219
	City/County Pari-Mutuel Tax	N/A	N/A	$274,334	$324,276	$289,939	$296,073

(1) $82,096 Reverted to licensee for tax credit.
(2) $20,524 Reverted to licensee for tax credit.
(3) $82,267 Reverted to licensee for tax credit.
(4) $20,567 Reverted to licensee for tax credit.
(5) $78,458 Reverted to licensee for tax credit.
(6) $19,865 Reverted to licensee for tax credit.
(7) $2,727 To General Fund.
(8) $22,513 To General Fund.
(9) $89,810 Reverted to licensee by County.
(10) $60,820 Reverted to licensee by County.
(11) $16,239 Reverted to licensee by County.

IOWA RACETRACK LIVE RACING STATISTICS

		1991	1992	1993	1994	1995	1996	1997	1998
Prairie Meadows (1985-1988 indicates Harness Circuit Only)	Number of Performances	105	N/A	60	60	62	62	98	97
	Taxable Attendance	296,713	N/A	282,776	See Simulcast	See Simulcast	See Simulcast	See Simulcast	See Simulcast
	Mutuel Handle	$17,541,241	N/A	$5,362,700	$4,662,076	$4,946,271	$6,217,760	$8,536,154	$8,101,722
	Breakage	$176,817	N/A	$48,013	$43,043	$45,902	$50,417	$73,726	$75,078
	Unclaimed Winnings	$81,032	N/A	$31,463	$18,179	$38,408	$42,334	$61,080	$47,286
	State Pari-Mutuel Tax	$0	N/A	$0	$0	$0	$0	$0	$0
	City/County Pari-Mutuel Tax	$0	N/A	$0	$0	$0	$0	$0	$0
Bluffs Run	Number of Performances	455	462	457	452	356	363	365	365
	Taxable Attendance	675,629	603,272	433,580	401,094	3,696,297	4,060,004	4,151,129	4,160,466
	Mutuel Handle	$66,832,377	$57,863,437	$42,277,746	$34,455,244	$24,208,495	$17,523,647	$14,103,172	$13,430,403
	Breakage	$288,054	$304,914	$197,779	$129,381	$94,348	$75,208	$58,755	$55,608
	Unclaimed Winnings	$248,401	$226,394	$157,523	$129,198	$138,121	$124,608	$96,636	$92,804
	State Pari-Mutuel Tax	$3,341,619	$2,893,172	$1,891,110	$1,378,210	$726,255	$525,709	$423,095	$402,912
	City/County Pari-Mutuel Tax	$668,324	$578,634	$422,777	$344,552	$242,085	$175,236	$141,031	$134,304
Dubuque Greyhound Park	Number of Performances	255	249	212	159	153	160	161	159
	Taxable Attendance	279,555	199,285	107,361	See Simulcast	See Simulcast	See Simulcast	See Simulcast	See Simulcast
	Mutuel Handle	$28,179,552	$19,867,762	$7,398,008	$4,391,919	$3,365,181	$3,401,417	$3,502,625	$3,484,140
	Breakage	$90,616	$186,945	$31,171	$19,950	$15,101	$15,976	$16,330	$17,273
	Unclaimed Winnings	$134,732	$101,117	$76,512	$46,267	$35,045	$40,670	$36,279	$36,344
	State Pari-Mutuel Tax	$845,387	$596,033	$221,940	$131,757	$100,955	$102,043	$105,079	$104,524
	City/County Pari-Mutuel Tax	$281,796	$198,678	$73,980	$43,919	$33,652	$34,014	$35,026	$34,841
Waterloo Greyhound Park	Number of Performances	222	227	253	110	N/A	N/A	N/A	N/A
	Taxable Attendance	217,752	164,437	128,683	41,554	N/A	N/A	N/A	N/A
	Mutuel Handle	$25,548,278	$18,907,332	$12,804,286	$3,418,702	N/A	N/A	N/A	N/A
	Breakage	$66,357	$170,047	$34,467	$10,238	N/A	N/A	N/A	N/A
	Unclaimed Winnings	$105,181	$87,318	$67,964	$25,380	N/A	N/A	N/A	N/A
	State Pari-Mutuel Tax	$766,448	$567,220	$384,129	$102,561	N/A	N/A	N/A	N/A
	City/County Pari-Mutuel Tax	$255,483 (9)	$187,073 (10)	$128,043 (11)	$34,187	N/A	N/A	N/A	N/A

(1) $82,096 Reverted to licensee for tax credit.
(2) $20,524 Reverted to licensee for tax credit.
(3) $82,267 Reverted to licensee for tax credit.
(4) $20,567 Reverted to licensee for tax credit.
(5) $78,458 Reverted to licensee for tax credit.
(6) $19,865 Reverted to licensee for tax credit.
(7) $2,727 To General Fund.
(8) $22,513 To General Fund.
(9) $89,810 Reverted to licensee by County.
(10) $60,820 reverted to licensee by County.
(11) $16,239 Reverted to licensee by County.

IOWA RACETRACK SIMULCAST STATISTICS

		1989*	1990*	1991	1992	1993	1994	1995	1996	1997	1998
Prairie Meadows	Number of Performances	N/A	N/A	372	929	1,086	1,441	1,829	2,875	4,151	4,086
	Taxable Attendance	N/A	N/A	44,768	245,030	SEE LIVE	259,778	2,495,649	3,398,006	3,424,974	3,353,457
	Mutuel Handle (Signals Received)	$384,038	$5,133,942	$18,348,217	$38,405,632	$34,029,649	$32,385,946	$25,805,859	$22,539,333	$22,230,862	$22,405,324
	Mutuel Handle (Signals Sent)	$0	$0	$0	$0	$0	$0	$1,357,412	$11,599,547	$43,106,976	$51,403,156
	Breakage	N/A	N/A	$16,962	$123,321	$135,956	$185,990	$151,975	$128,143	$118,494	$134,440
	Unclaimed Winnings	N/A	N/A	$11,529	$60,054	$58,501	$78,440	$135,206	$129,802	$155,335	$90,401
	State Pari-Mutuel Tax	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
	City/County Pari-Mutuel Tax	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
Bluffs Run	Number of Performances	N/A	N/A	N/A	N/A	N/A	766	1,394	1,857	3,836	4,597
	Taxable Attendance	N/A	N/A	N/A	N/A	N/A	SEE LIVE	SEE LIVE	SEE LIVE	SEE LIVE	SEE LIVE
	Mutuel Handle (Signals Received)	N/A	N/A	N/A	N/A	N/A	$8,937,202	$13,449,267	$17,566,077	$22,887,116	$18,906,245
	Mutuel Handle (Signals Sent)	$0	$0	$0	$28,805,152	$31,111,770	$27,914,369	$10,838,954	$2,775,158	$9,198,936	$12,938,412
	Breakage	N/A	N/A	N/A	N/A	N/A	$66,546	$99,642	$117,574	$146,454	$126,815
	Unclaimed Winnings	N/A	N/A	N/A	N/A	N/A	$0	$0	$0	$487	$80,036
	State Pari-Mutuel Tax	N/A	N/A	N/A	N/A	N/A	$178,744	$268,986	$351,322	$457,742	$378,126
	City/County Pari-Mutuel Tax	N/A	N/A	N/A	N/A	N/A	$0	$0	$0	$0	$0
Dubuque Greyhound Park	Number of Performances	N/A	N/A	N/A	N/A	330	602	747	1,072	1,314	1,309
	Taxable Attendance	N/A	N/A	N/A	N/A	18,944	97,524	157,672	695,123	822,817	873,009
	Mutuel Handle	N/A	$15,290	N/A	N/A	$5,130,891	$8,940,378	$6,135,675	$5,780,154	$5,300,886	$5,143,580
	Breakage	N/A	N/A	N/A	N/A	$14,351	$19,908	$15,680	$13,781	$12,152	$12,919
	Unclaimed Winnings	N/A	N/A	N/A	N/A	$12,944	$17,180	$20,056	$21,856	$21,920	$26,973
	State Pari-Mutuel Tax	N/A	N/A	N/A	N/A	$51,309	$69,404	$61,357	$57,802	$53,008	$51,436
	City/County Pari-Mutuel Tax	N/A	N/A	N/A	N/A	$51,309	$69,404	$61,357	$57,802	$53,008	$51,436
Waterloo Greyhound Park	Number of Performances	N/A	N/A	N/A	N/A	358	452	441	348	N/A	N/A
	Taxable Attendance	N/A	N/A	N/A	N/A	29,688	32,569	38,458	16,658	N/A	N/A
	Mutuel Handle	N/A	N/A	N/A	N/A	$5,171,674	$6,100,843	$5,519,899	$2,444,010	N/A	N/A
	Breakage	N/A	N/A	N/A	N/A	$2,883	$18,087	$14,684	$5,724	N/A	N/A
	Unclaimed Winnings	N/A	N/A	N/A	N/A	$5,938	$7,631	$5,503	$10,659	N/A	N/A
	State Pari-Mutuel Tax	N/A	N/A	N/A	N/A	$51,717	$61,008	$55,199	$24,440	N/A	N/A
	City/County Pari-Mutuel Tax	N/A	N/A	N/A	N/A	$51,717	$61,008	$55,199	$24,440	N/A	N/A

*Simulcasting was not allowed without live racing. May 1991 legislation allowed simulcasting without live racing.

IOWA RACING AND GAMING COMMISSION
MINUTES
JANUARY 19-20, 1994

The Iowa Racing and Gaming Commission (IRGC) met on Wednesday, January 19, 1994, at 5:00 p.m. at Adventureland Inn in Altoona, Iowa. Commissioners present were: Chair, Lorraine May; Vice-Chair, Dick Canella; and members Rita Sealock and Del Van Horn.

Chair May called the meeting to order and entertained a motion to move into Executive Session for the purpose of hearing the results of background investigations performed by the Division of Criminal Investigation (DCI). Commissioner Canella so moved with Commissioner Van Horn seconding the motion. Motion passed.

Following Executive Session, the Chair recessed the meeting until 8:30 a.m., Thursday, January 20, 1994.

The Chair reconvened the meeting at 8:30 a.m., on Thursday, January 20, 1994, at Adventureland Inn in Altoona, Iowa. Commissioner Blair joined the meeting.

The Chair entertained a motion to approve the agenda with the addition of administrative business. Commissioner Sealock so moved with Commissioner Canella seconding the motion. Motion passed.

Chair May recognized Jack P. Ketterer, Administrator for IRGC, to discuss the next item on the agenda, adoption of amendments to Chapter 20. "Process for Excursion Gambling Boats" and Chapter 25, "Riverboat Operations," Iowa Administrative Code. The amendments would add the language "not more than" indicating the original licenses issued would not exceed three years and would be subject

to annual renewals thereafter. The language in the rule would then mirror the statutory language in 99F.7.

Commissioner Canella moved to adopt the amendments to Chapters 20 and 25, with Commissioner Sealock seconding the motion. Motion passed. (See Order 94-1)

Chair May called up the Sioux City Sue operations status and recognized Bruce Crary, counsel for the Sioux City Sue. Mr. Crary stated that during November, he and the Sioux City Riverboat Corporation spoke with several business entities who were interested in the success of the Sioux City Sue. He stated that Gaming Development, Inc., was chosen by Sioux City Riverboat Corporation and the Missouri River Historical Development (MRHD) to manage the Sioux City Sue until early April.

Jerry Hanson, a representative for the City of Sioux City stated that the City fully supports Gaming Development, Inc., and is looking forward to keeping either the Sioux City Sue, or another boat in the Sioux City area.

David O'Brien representing MRHD, agreed that he felt confident that Gaming Development, Inc., would be able to fulfill their obligation as manager and that it would be a good deal for everyone.

* * *

Commissioner Canella moved to approve the above named contracts with Commissioner Blair seconding the motion. All in favor. (See Order 94-10)

Linda K. Vanderloo, Director of Racing Administration for IRGC, discussed the contract approvals for Bluffs Run. She recommended approval of contracts with Post Time

Publications, Inc. for programs, and Line-True Photo's Inc., for photo finishes.

Commissioner Blair moved to approve the two contracts for Bluffs Run. The motion was seconded by Commissioner Sealock. Motion passed. (See Order 94-11)

Chair May called up the next item on the agenda which was the Staff recommendations for proposed legislation. Mr. Ketterer discussed the staff recommended changes for proposed legislation in order to make IRGC regulation more effective, avoid misleading the public, and remove outdated or unnecessary requirements. (See attached)

Chair May entertained a motion to approve staff recommended changes to proposed legislation. Commissioner Canella so moved with Commissioner Sealock seconding the motion. Motion passed unanimously. (See Order 94-12)

Commissioner Blair stated that he wanted to take this opportunity to thank Commissioner May and the other Gaming Study Panel for their hours of research and commitment to the Gaming Study. He asked whatever happened with the results the panel reached.

Chair May stated that she has received no communication in connection with research provided and at this point the status is unknown.

Commissioner Blair stated that he feels IRGC had achieved the original goals of the legislation. However, competition from outside the state, as well as Indian gaming competition seems to have set into motion severe economic forces that affect Iowa's licensees. In terms of regulation of these industries, the Commission was committed to the goals of economic development, tourism, job creation and tax revenues which have been achieved.

Commissioner Blair explained that it has nearly come to a point where we cannot effectively continue to meet those goals. With all the research and time involved in trying to find a solution to control these issues, it seems that these issues are not being discussed. Commissioner Blair stated again that he would like to thank Commissioner May and the Gaming Panel for everything they have done to remind us of our goals, find solutions and continue to achieve these goals.

Chair May stated that this a very emotional issue and that the only thing that the Commission can do is to keep a focus on the facts and issues and continue to try to provide the information necessary to come to a logical conclusion.

Otto Steele, member of Citizens for a Gambling Free Government, asked Mr. Ketterer to comment on his appearance before the legislative subcommittee, yesterday to recommend that the state allocate money for regulation of the Indian casinos.

Mr. Ketterer explained that the legislative subcommittee requested Chuck Sweeney, Director of the Department of Inspections and Appeals, to give a report relating to proper and correct negotiation with the tribes. Mr. Sweeney asked him to assist with the questions concerning what was being done to monitor the compacts. Mr. Ketterer stated that the way he understood it, the legislature felt that Iowa should not interfere with the tribal casinos without requiring the same things we were requiring from the riverboats. We do not regulate the Indian casinos; we only monitor their compacts. The tribes, as sovereign entities, have their own tribal commissions. The difficulty for the Commission, as well as any state agency, is that we cannot assure Iowans that go to the Indian

casinos that the casinos will be regulated in the same manner as the riverboat casinos. There seems to be some public policy considerations that should protect Iowans going in there. This creates a very difficult situation when one branch of government is saying we should not spend money and/or give the appearance of regulation and another branch saying there should be some type of protection for Iowans who go into those casinos. There needs to be some type of consensus between the two branches of government as to how they wish to handle this.

Mr. Steele stated that he would hope that there would be stronger or increased regulations on the riverboats should the limits be raised, such as more law enforcement, and considerations for the growing gambling addictions and other types of problems.

Mr. Ketterer welcomed any input from Mr. Steele related to those items.

Chair May stated that regulatory time would be freed up by the raising of limits, because all the time and energy spent trying to enforce the limits could be well spent by focusing on the integrity of the games.

Chair May called up the next item on the agenda which was the appointment of the administrator. Commissioner Canella moved to appoint Jack P. Ketterer as Administrator of the IRGC from May 1, 1994, to April 30, 1998. Commissioner Sealock seconded the motion. Motion unanimously passed. (See Order 94-13)

Mr. Ketterer stated that he appreciated the Commission's vote of confidence, and felt that much was owed to a very capable staff.

Chair May stated that the March Commission meeting currently set for March 17, 1994, would need to be re-scheduled. After deliberation among the Commissioners, it was decided the next meeting would be held March 3, 1994.

Meeting was adjourned.

Minutes taken by Debbie Baker

[LOGO]

IOWA RACING AND GAMING COMMISSION

SUPPLEMENT TO 1992 ANNUAL REPORT PURSUANT TO IOWA CODE CHAPTER 99D.21

With the ten-year anniversary of the initial adoption of pari-mutuel legislation in Iowa and the second anniversary of the opening of riverboat gambling, it is an appropriate time to review the effect of the legislation, whether or not it is meeting its intended goals, and the status of the industry.

The danger in any analysis is obvious. The report is not only subject to selective quotation but will inevitably be criticized by gambling opponents as a pro-gambling evaluation and by the gambling interests as overly critical. Depending upon the bias of the reader, both criticisms might be justified.

In order to make informed decisions, however, information is necessary; the fact that no single study can be complete and without controversy should not and will not prevent accumulation of information.

The Iowa Racing and Gaming Commission (IRGC) is charged with preparing an annual report to the Governor for the period ending December 31 of each year under Iowa Code Section 99D.21. The report is to include not only an account of the commission's actions, financial position and the results of operation, but information concerning practical results attained under the pari-mutuel chapter. In an effort to meet that charge, this report has been prepared.

The purposes of the pari-mutuel and riverboat legislation are tax generation, economic development and job

creation, riverfront development, and promotion of tourism. The impact on the quality of life in the various communities affected should also be reviewed.

I. TAX GENERATION

The first pari-mutuel track, Dubuque Greyhound Park, opened June 1, 1985. It was followed by Bluffs Run in February of 1986, Waterloo Greyhound Park in October of that same year and Prairie Meadows in March 1989.

On April 1, 1991, three riverboats began operation on the Mississippi River – the Dubuque Casino Belle, the Diamond Lady and The President. In May of that year, the Emerald Lady began operation with the Mississippi Belle II following in June. The most recent addition, the Sioux City Sue, opened in January of 1993. Two of these boats, the Diamond Lady and the Emerald Lady have since elected to move out-of-state.

Direct comparisons are difficult because the IRGC annual report is prepared on a calendar year, the tracks operate seasonally and the state budgets on a fiscal year (July through June). Some of the numbers below would be affected by the change from calendar to fiscal year calculations and in fund sources, but, in the aggregate, should be representative.

Although it is difficult to summarize direct tax revenue in an ever-changing environment, the data on file in the Commission office shows the following contributions to general revenue funds of the State on a *calendar year* basis:

	Pari-Mutual Tax***	Track Adm. Tax	Unclaimed Winnings, fines, and license fees	Rvboat Adm. Rvboat Taxes	Rvboat License Fees and Fines
1985	$2,105,033		257,508*		150,000
1986	9,326,570		672,838*	12,153,955	164,459
1987	10,843,962		870,672*	9,593,512	111,595
1988	11,184,100		999,407*		
1989	9,401,992		925,087*		
1990	6,428,572		754,847*	686,800	
1991	4,953,454	757,230	240,822	672,295	
1992	4,056,425	606,012	216,405		

***Figures shown are NET of tax credits.

*Unclaimed Winnings only.

Note: 1985 through 1988 figures include harness circuit.

THE TOTAL CONTRIBUTION TO THE GENERAL FUND SINCE THE INCEPTION OF PARI-MUTUEL AND RIVERBOAT GAMBLING IS $88,133,552.

In order to ascertain the net effect on the general revenue fund, however, one must take into consideration the amount expended or appropriated in regulation of the industry and other costs together with other funding sources.

With startup expenses in fiscal year 1985, IRGC received an appropriation from the General Fund of $296,400. From fiscal year 1986 until fiscal year 1992 (commencing July 1, 1991), the pari-mutuel expenses of IRGC costs were paid from the track admission fees, daily license fees, fines and occupational license fees paid by the licensees *not* included in the amounts paid into the general fund. Drug testing costs were billed to the, licensee. Those amounts were sufficient to provide not only the cost of regulation but also led to a reserve of approximately $692,000 which was transferred to the Child Support Recovery Unit. In addition, from those fees, IRGC awarded research grants to Iowa State University of $627,451 (1985 through 1990).

Expenses attributable to the general fund for those years (fiscal years 1985 through 1991) for pari-mutuel activities would include the following:

Department of Public Safety	$1,029,570
Department of Agriculture & Land Stewardship	464,027

Effective July 1991, the pari-mutuel and riverboat laws were changed to provide for payment of admission

fees, daily license fees, fines and occupational license fees into the general fund. Since that time, IRGC has received an appropriation through the general fund. We, therefore, have only one complete fiscal year (FY92) in which all of the income and expenses for pari-mutuel and the riverboats can be directly compared through expenditures and receipts of the general fund.

In *fiscal year* 1992, the total payment into the General Fund was $21,853,157. From that amount, the State appropriated the following from the General Fund: $2,317,718 to the IRGC for regulation of racing and riverboats, $286,989 to the DCI for pari-mutuel, and $174,090 to the Department of Agriculture and Land Stewardship. In addition $1,550,000 was spent by the DCI from the General Fund in connection with the riverboats (net of background reimbursements). Actual DCI expenditures for FY 1992 in connection with the riverboats was $1,679,500; however, $129,500 was recouped from background reimbursements, leaving the above balance from the General Fund. The General Fund appropriation for the Gambler's Assistance Fund was $400,000, of which riverboat revenues contributed a portion and which also includes a contribution from Lottery. Further, $250,000 of the $400,000 allocation to Gambler's Anonymous was actually spent; but, for purposes of this report, the entire $400,000 will be considered. as expended and charged entirely to the pari-mutuel/riverboat industries with no allocation to Lottery.

In summary, in fiscal year 1992 there was a direct net positive impact on the General Revenue Fund of $17,524,360, not including Gambler's Assistance.

In addition, the tracks and riverboats have paid the following taxes in accordance with 99D and 99F to city and county governments by *calendar year*:

	Pari-Mutuel Tracks	Riverboats
1985	$ 416,902	
1986	1,861,201	
1987	2,164,619	
1988	2,214,854	
1989	1,996,373	
1990	1,486,582	
1991	1,205,603	$ 644,932
1992	876,576***	699,042

*** Net less the $89,810 refunded by Black Hawk County to Waterloo Greyhound Park.

TOTAL CONTRIBUTIONS TO CITY AND COUNTY GOVERNMENTS THROUGH 1992: $13,566,684.

In addition, Bluffs Run has paid $846,055 in property taxes since 1986.

II. ECONOMIC DEVELOPMENT AND JOB CREATION

The information concerning direct tax revenue does not take into consideration the tax revenue generated by the economic development and jobs created as a result of the businesses established by the legislation. It is obviously a more difficult impact to measure as each dollar generated has a multiplier effect in the economy. Unlike

the lottery which is operated by the State and from which the State keeps the profits, the greatest economic impact of the pari-mutuel and riverboat industries is indirect.

Perhaps one should start with the basics. The payrolls for the various licensees in 1992 were as follows**:

Dubuque Greyhound Park (11/91 - 11/92)	$ 1,481,086
Waterloo Greyhound Park (Year ending 5/31/92)	1,405,457
Bluffs Run (calendar year)	3,775,115
Prairie Meadows (calendar year)	2,163,584
Dubuque Casino Belle (calendar year)	5,460,569
The President (calendar year)	14,201,721
Mississippi Belle II (calendar year)	2,233,606

**The Emerald Lady and the Diamond Lady which departed in July 1992 are not included. The above numbers reflect gross salaries and benefits but do not include employer taxes paid. Nor is the amount of Iowa state income tax paid readily available as the state income tax withheld would not necessarily reflect the actual tax liabilities.

In 1992, The President was the *SIXTH* largest employer in the Quad Cities.

The salary ranges for these jobs obviously vary. For most positions, the riverboat and pari-mutuel industries must compete for employees with other employers in the community. However, even for jobs which would otherwise

command only minimum wage in the market, the riverboats must statutorily pay 125% of minimum wage.

In addition, the following amounts have been paid to the trainers, jockeys, kennel operators and owners of racing animals by *calendar year*:

	Purses	Dog Promotion	Breeders Awards, Supplements & Iowa Stakes Races
1985	$ 1,463,405		262,049
1986	5,870,375		808,555
1987	6,792,510		1,051,180
1988	6,693,682		1,018,194
1989	9,732,839	7,949	1,012,820
1990	6,850,848	6,834	754,850
1991	6,210,152	14,969	995,610
1992	3,768,946	18,223	1,298,831
TOTALS	**$ 47,382,757**	**$ 47,975**	**$ 7,202,089**

The purses paid have an impact throughout this state as the money is filtered to rural Iowa to pay for the feed, the kennels, the veterinary supplies, the bedding, the supplies and other services needed by the industry.

According to a release from the Department of Agriculture and Land Stewardship dated March 1, 1990, the "breeding, raising and training of race horses is a $50 million industry in Iowa."

The most recent information from the Iowa Department of Agriculture and Land Stewardship concerning the greyhound industry was released in 1988. According to that release:

> "Greyhound racing in Iowa adds an extra $2 million in economic activity to the state's agricultural sector, according to survey results released today by Iowa Secretary of Agriculture Dale M. Cochran. The breeding, caring for, and training of greyhounds used on the racing circuit is included in the agricultural sector of the economy. 'The breeders, owners, and trainers of the dogs used in racing generate this money through the wages they pay, the goods and services they purchase, and the licensing fees and taxes they pay,' said Cochran.
>
> In addition, according to Cochran, greyhound owners have $5.5 million invested in their dogs. . . . "

When that report was prepared in 1988, there were five or fewer Iowa kennels operating at the dog tracks in Iowa. In 1992, there were twenty-seven (27) Iowa-based kennels at the three pari-mutuel dog tracks in Iowa. While some projections could be made on that basis, the multiplier effect would not be precisely accurate.

With the passage of the pari-mutuel legislation, $87,000,000 was spent in Iowa to build the four race tracks.

The sponsoring non-profits have also received funds, from these industries which have been used in support of civic and charitable causes in the various communities. In 1991, the sponsoring non-profits of riverboat operations received $5,197,971, and in 1992 they received $3,818,127,

for a total over the twenty-one months of operation of $9,016,098.

These amounts do not include the sums donated by the sponsoring organizations of the tracks or those funds contributed by the gambling entities as corporate citizens. For example, in 1992, The President Riverboat Casinos contributed an additional $150,000 to charitable causes. Since Bluffs Run began operation, Iowa West Association, as the licensed non-profit for the dog track, reports that it contributed $1,255,189 to charitable causes.

Each of these entities, tracks and riverboats, require services from the community in which they exist. Each purchases a variety of goods and services from food and beverages to electricity to accounting and legal services to flowers and steel beams.

Since April 1, 1991, through November 30, 1992, The President, for example, has paid $17,331,405 to vendors in the Quad Cities alone.

As an outgrowth of the racing industry in Iowa, the Iowa State University Racing Chemistry Section of the Veterinary Diagnostic Laboratory, located in Ames, Iowa, was created and has developed an expertise in drug detection, research and methodology acknowledged internationally. This laboratory was the first in the nation to develop the expertise and capability to test for anabolic steroids in equine. Further, Dr. Walter Hyde, Director of the Racing Chemistry Laboratory was the only representative from the United States to attend and present a research paper at an international meeting in Zimbabwe. Racing chemists throughout this country, and the world, come to Iowa State University to train in this field.

In recognition of its premiere expertise in racing chemistry, the Iowa State University Laboratory was recently awarded a contract to serve as the research and reference lab for the Association of Racing Commissioners International, an organization representing state and foreign countries. This contract, in the first year, brought $300,000 of out-of-state research funds into the State of Iowa, funds which had previously (since 1965) been directed to Ohio State University.

In addition, Iowa State University currently provides testing services for the State of California. During the first ten months of the contract, more than $120,000 was received. The laboratory also has a four-year contract with the State of Kansas. Receipts from that contract during the first year (July 1, 1991 through June 30, 1992) totalled $327,238.

As a direct result of the pari-mutuel industry in Iowa and the expertise developed at Iowa State University in response to that industry need, Iowa State University has become the acknowledged leader in racing chemistry. The laboratory regularly employs seventeen individuals at a combined annual salary, including benefits, of $473,424. Those salaries are funded entirely by racing chemistry revenue.

III. RIVERFRONT DEVELOPMENT

One of the stated purposes of the riverboat legislation was riverfront development. The riverfront in many of our cities had deteriorated with lack of use in recent years. With the arrival of the riverboats, the areas were renovated.

According to the information received from the cities and licensees, the following amounts have been expended in riverfront development with the arrival of the riverboats:

Davenport

The City spent approximately $289,000 in connection with the riverfront renovation in recent years, most of which were legal or consultant fees.

The President Riverboat Casinos spent $3,192,800 on the levy and $650,000 on facility improvements on the waterfront.

Clinton

In Clinton, the boat operator spent approximately $1,000,000 and the City expended approximately $500,000 to develop the riverfront area.

Dubuque

$7.7 million has been spent in the development and renovation of the riverfront in Dubuque. The City advanced $4 million on the project and this amount was fully reimbursed by the nonprofit licensee in the first eight months of operation. The $3.7 million balance was paid by the operator.

Sioux City

The City has spent approximately $850,000 on riverfront development; the boat operator has made no cash expenditure on permanent waterfront development.

Fort Madison-Burlington-Keokuk

The City of Fort Madison spent $2.6 million in developing their riverfront with the anticipation that riverboat gambling would be in their community for years to come. The City of Burlington invested approximately $50,000

with the operator investing another $35,000. In Keokuk, the city invested $1 million in riverfront development.

IV. SOCIETAL IMPACT

Given the moral controversy surrounding the gambling industry and the difficulty in measuring the effect on individual lives, societal impact is difficult to objectively determine. In this area perhaps more than any other, one's moral convictions influence perceptions and dictate conclusions.

As noted in a five-year impact study prepared through the commission, "When the pari-mutuel industry came to Iowa, the critics of gambling often made the remark that betting in Iowa at the dog and horse tracks would bring the undesirable elements to our state." The Commission, in close cooperation with the Division of Criminal Investigation, continues to monitor for the infiltration of these negative influences.

As a starting point, the law enforcement agencies of the cities and counties in which tracks and/or riverboats are located were contacted. In relevant part, the following information was received:

> "Our statistics show that any recent increases in crime in Black Hawk county has been drug related. In also checking with the Black Hawk County Attorney's Office, they indicate no knowledge of any crimes relating to the gambling in Black Hawk County.
>
> In my personal opinion, the Waterloo Greyhound Park has had no negative impact upon the criminal justice system in Black Hawk County and in fact has been a positive factor in terms of

employment and monies returned to the governing bodies."

Michael Kubik
Sheriff of Black Hawk County

"Prior to the Greyhound Park opening there was some concern in the law enforcement community, including the Waterloo Police Department, that this type of activity may adversely affect the crime rate in the community. Our experience since that time, however, has not shown this to be a fact. While crime rates have increased over the past several years, this increase is not attributed to the Greyhound Park or its operations. The major cause of any increase in the crime rate is due to the increased influx of drugs and narcotics into the community over the past several years. This increase in the influx of drugs into this area is not caused by or related to the Greyhound Park operation."

Bernal F. Koehrsen, Jr., Chief of Police
City of Waterloo

"When it was first announced that Dubuque had been selected to be the site of a greyhound racing track, staff members of the Police Department met to discuss the expected impact on our crime rate.

Early predictions indicated that we could anticipate an increase in illicit drug trafficking and use, prostitution, and some infiltration of organized crime.

We are just beginning our ninth season of racing and I have to say that none of these negative aspects have come to pass. There has been no appreciable escalation of our crime statistics which could be directly attributed to the greyhound track. Our. involvement in terms of violations has been primarily misdemeanor offenses

such as public intoxication and fighting (usually domestic in nature).

. . . .

In conclusion, I would like to add that all our apprehensions have been put to rest. We are proud of our park and consider it to be one of the top tourist attractions our city has to offer."

Terry F. Lambert, Assistant Chief of
Police City of Dubuque

"The industry came to our county, first, the dog track and then riverboat gambling. I can say that I have not seen an increase in the inmate population in the county jail as a result of the gambling industry.

Because both the dog track and the docked riverboat are in the city limits of Dubuque, the Sheriff's Department is not the primary responding agency. However, if there were problems the Sheriff's Department would see an increase in its jail population. We have not seen that increase.

The gambling industry so far has not been a problem for the Dubuque County Sheriff's Department."

Leo J. Kennedy Dubuque County
Sheriff

"In reference to your inquiry on the impact riverboat gambling has had on crime in Scott County, it has had very little impact. There has been no noticeable increase in crime due to the new gaming industry. A possible exception to this may be an increase in car break-ins in our hotel and motel parking lots. We have, however, experienced an increase in vehicular traffic and parking problems around the boats."

Mike Bladel
Sheriff of Scott County

"Recently Police Chief Steve Lynn released a **Uniform Crime Report**. In this report, overall crime decreased in Davenport, which is one of the largest communities in the Quad Cities. The 1992 crime statistics show larceny/theft down by 521, burglaries down by 399 and robberies down by one from the 1991 crime totals.

I do not believe that riverboat gambling has brought an increase of crimes as was feared by many. In fact, the President Riverboat's private security has only asked for assistance with a disruptive passenger once or twice over the past two years."

Patrick J. Gibbs, Mayor Davenport,
Iowa

"I have been Sheriff of Pottawattamie County since January 1, 1993, and previous to that I was Sergeant of Investigations in the Sheriff's Department. To my knowledge Bluffs Run has had little or no effect on the criminal statistics that were previously mentioned."

Jefferey D. Danker,
Sheriff Pottawattamie County

"We are having a declining trend in the number of serious offenses reported in Council Bluffs. I don't feel that the opening of the dog track in 1986 has resulted in any serious impact for our department.

Bluffs Run has hired off-duty policy officers to work security and I believe this program has worked very well for all involved. The calls to the dog track are very minimal and have never proven to be very serious in nature.

I would like to emphasize that we have had a very good working relationship with the dog

track. They have permitted our department to use their facilities for training purposes for our driver's training and our K-9 Unit. It has definitely been a positive impact on our department especially in this regard."

Mark E. Moline
Council Bluffs Chief of Police

From the state perspective, Darwin Chapman, the Director of the Division of Criminal Investigation was contacted. According to Mr. Chapman, organized crime has not infiltrated this state through the gambling, industries and he has observed no negative impact on the crime rate resulting from the pari-mutuel and riverboat industries.

This is not a conclusion which either the DCI or the IRGC takes for granted, however. The agencies work closely together to protect the integrity of the sport or games. The gambling industry is very heavily regulated. There are two DCI agents assigned to each boat and one DCI agent is assigned to each track. Everyone working in the industry from the window teller to the management to the janitor to the individual who dispenses the soft drinks is licensed by the Commission and subjected to a DCI background check.

The impact of the addictive quality of gambling is more difficult to ascertain. The only information readily available comes from the Gamblers Assistance Program which is operated through the Department of Human Services. The following information was obtained from that program:

	Fund Revenue	Expenditures	No. Served
FY 86	$ 413,633	$ 9,844	N/A
FY 87	475,966	212,799	N/A
FY 88	623,540	400,429	258
FY 89	834,938	977,232	292
FY 90	815,197	815,197	351
FY 91	750,000*	670,719	362
FY 92	400,000*	250,000	306

A breakdown to determine the amount spent on advertising the program to identify clients and the dollars spent on actual service delivery was requested but not available.

V. STATE OF THE INDUSTRY

The pari-mutuel industry has been described as an industry in crisis. The statistics available support that conclusion. See Attachments A and B.

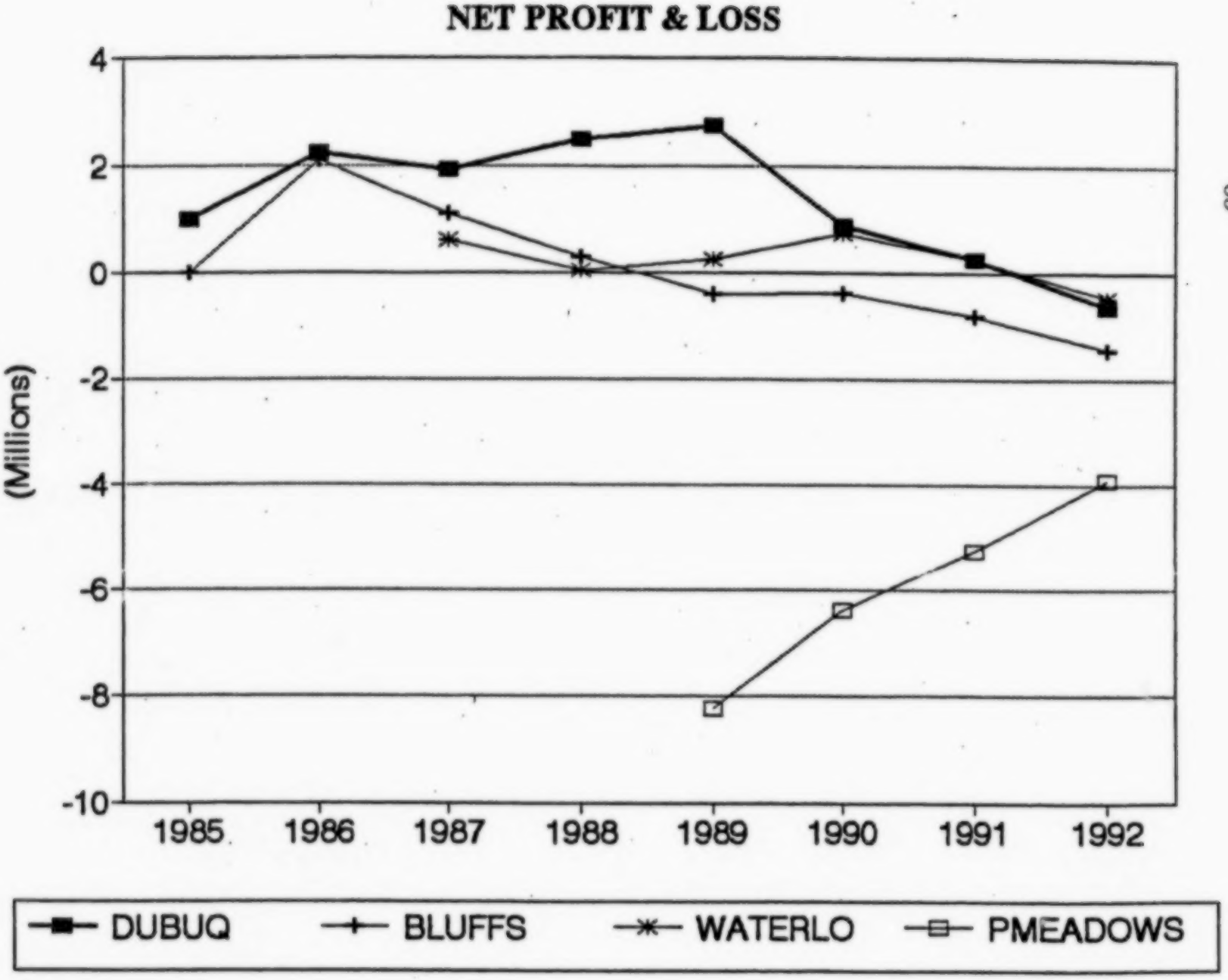
With the changes in the industry, including the opening of the Indian casinos and competition from neighboring states, and the total win from the riverboats have been impacted. See Attachments C and D.

While IRGC has been simultaneously criticized by gambling critics for not lobbying *against* changes in the gambling laws and by industry advocates for not lobbying *for* changes in those same statutes, neither is the function of IRGC. We are not lobbyists or advocates for either interest group. Those decisions are most appropriately left with elected representatives.

We are regulators and view ourselves as such. The only time IRGC becomes involved in the legislative process is in providing information and addressing those issues which affect our ability to effectively regulate and maintain the integrity of the industry.

The future of these industries lies in the hands of the legislature and the people of Iowa.

Information Compiled 5/93


NET PROFIT & LOSS
(Millions)
4
2
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-4
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1985
1986
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1991
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DUBUQ
BLUFFS
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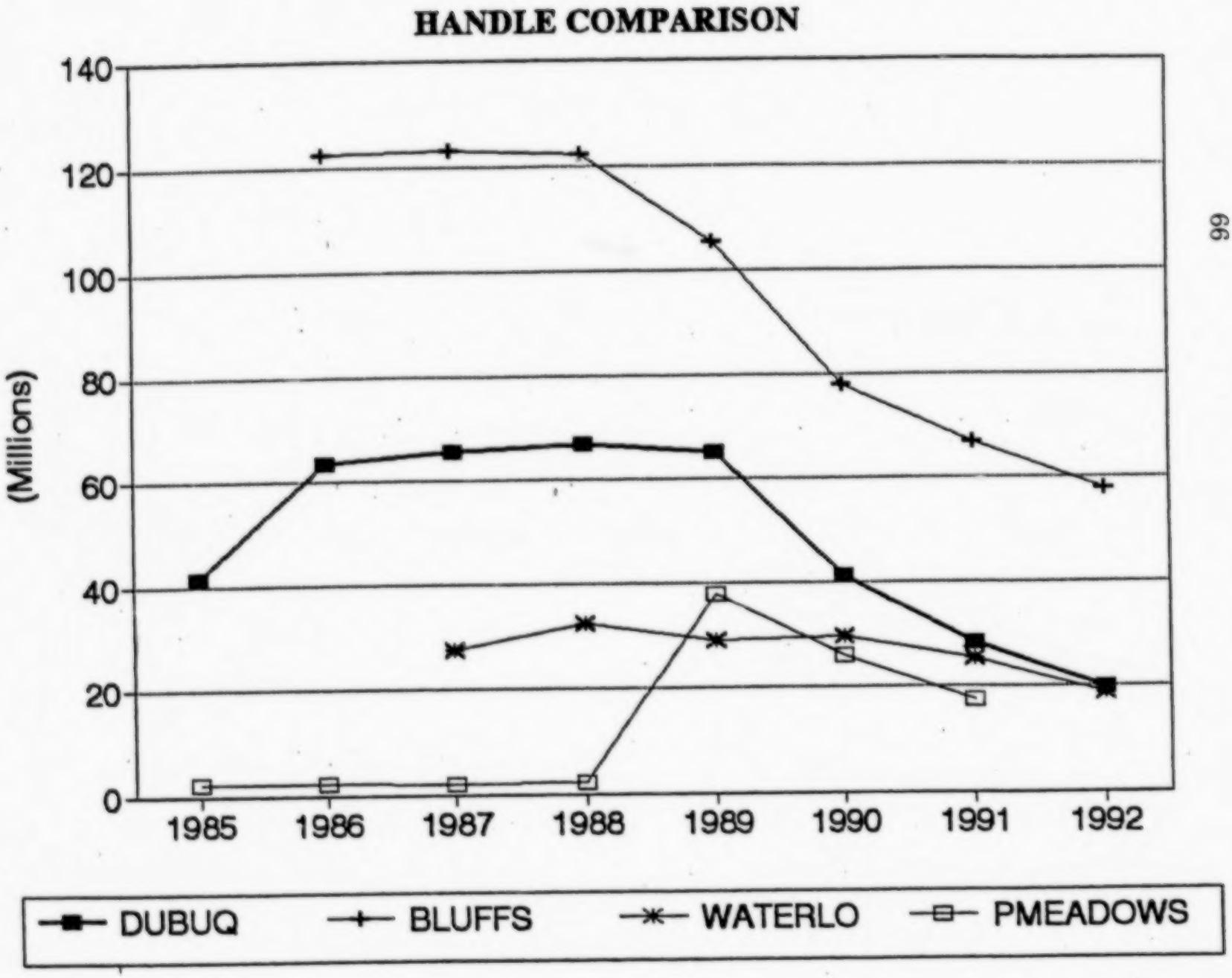
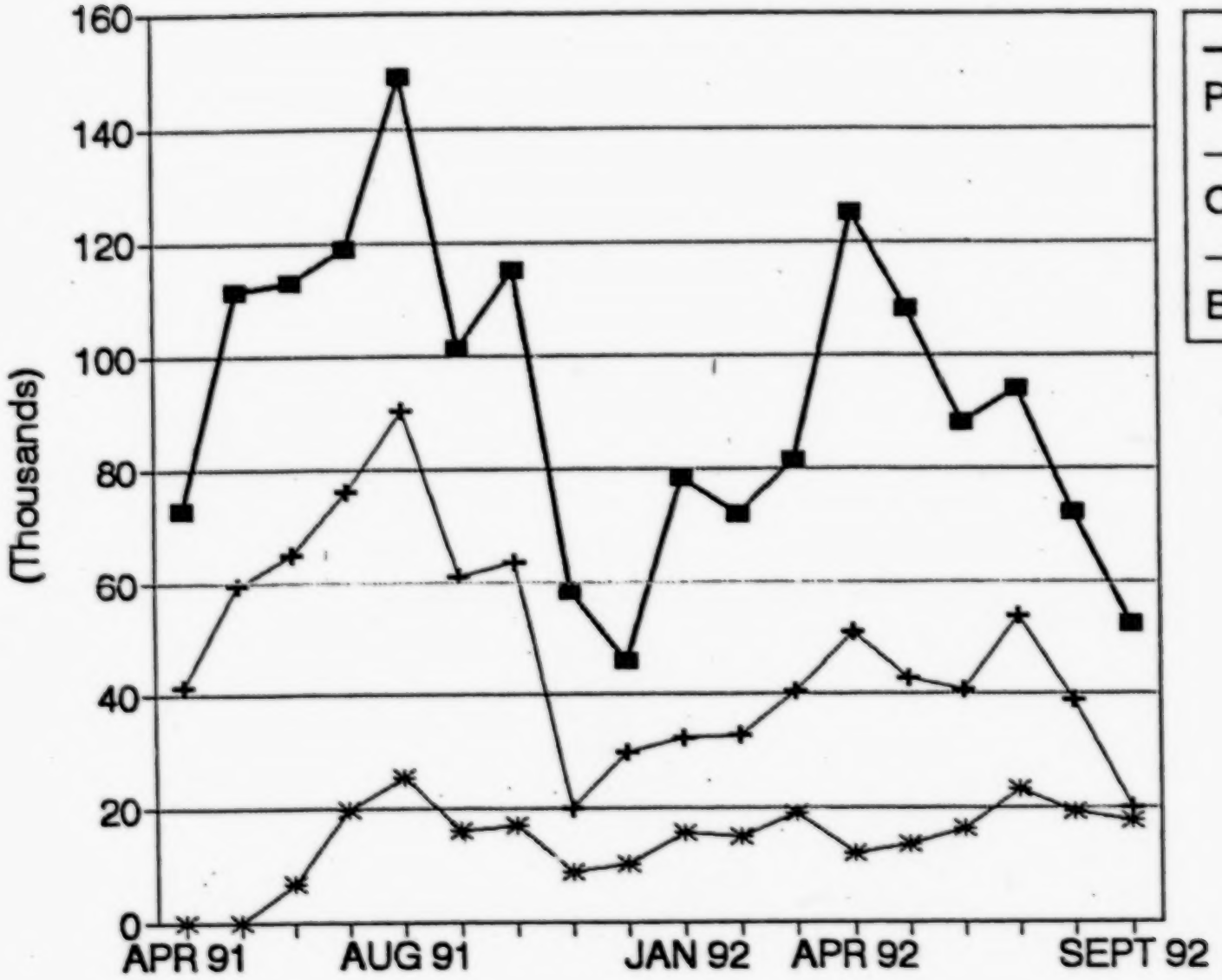
PMEADOWS

ATTACHMENT B

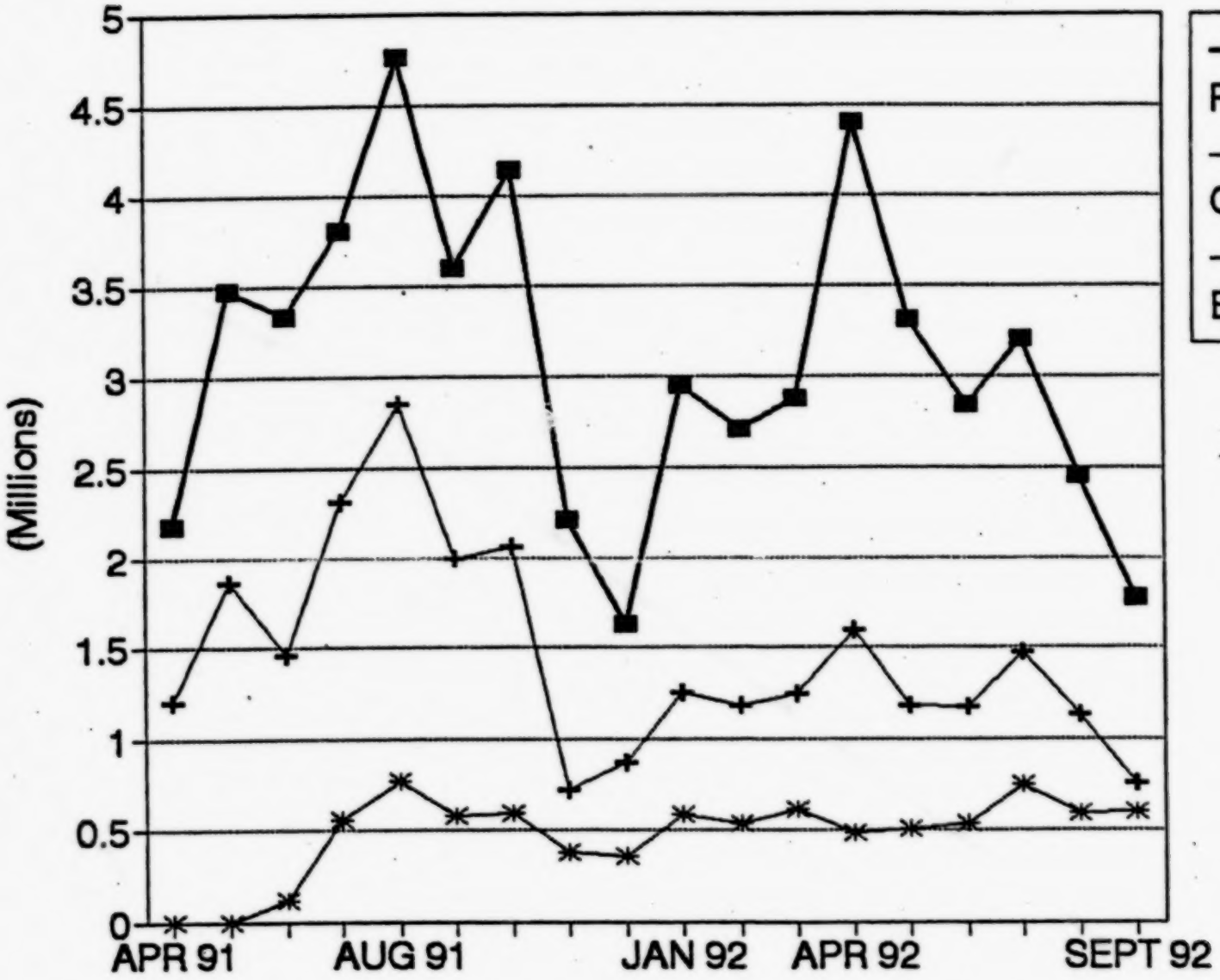


RIVERBOAT

ADMISSION COMPARISON



RIVERBOAT
TOTAL WIN COMPARISON



[SEAL] GOVERNOR
TERRY E. BRANSTAD

For Immediate Release:
August 26, 1993

CONTACT: Dick Vohs
515/281-3150

DES MOINES – Governor Terry Branstad today announced he is appointing Dr. Ed Stanek, Director of the Iowa Lottery, and Lorraine May, Chair of the Iowa Racing and Gaming Commission, to head a bipartisan committee to recommend changes in Iowa's gaming laws and regulations. Branstad is asking legislative leaders to appoint the four other members of the committee, a Republican and a Democrat from both the House of Representatives and the Senate.

Branstad charged the committee with conducing a detailed study of Iowa's gaming industry and asked for recommendations to retain jobs, assist the state's flood recovery efforts, address concerns of communities with gaming and protect the integrity of the state through regulation and control. The Governor ask the committee to report to him as expeditiously as possible.

The Governor said this approach is appropriate because no consensus has resulted among legislators or even among supporters or among opponents of gaming in Iowa.

GAMING STUDY

LORRAINE J. MAY
CO-CHAIR

EDWARD J. STANEK
CO-CHAIR

September 3, 1993

Governor Terry Branstad has appointed a bipartisan working group to conduct a detailed study of Iowa's gaming industry and, if appropriate, suggest changes in Iowa's gaming laws and regulations which might assist in retaining jobs, helping cope with flood recovery efforts, address concerns of communities with gaming, and protect the integrity of the State through regulation and control.

Any information you have concerning the gaming industry in Iowa (including economic development, effect on communities, employment, public concerns, regulation and control) and any opinions you have concerning amendments to the legislation and regulation governing the industry would be helpful in making an informed decision. Please submit an explanation of your views concerning those aspects of gaming which you feel need to be addressed and any information or documentation relative to these topics in writing to:

Gaming Study
4th Floor Equitable Building
Des Moines, Iowa 50309

or by FAX to (515) 288-2724.

The Governor has asked the study group to report as expeditiously as possible. It is imperative, therefore, that all responses be received *in writing* on or before September 23, 1993.

If you are aware of other individuals or entities who have information concerning the matters at issue or opinions concerning amendments to gaming legislation, please solicit their input and include it with your material or ask that it be submitted directly.

/s/ Edward J. Stanek
Edward J. Stanek

/s/ Lorraine J. May
Lorraine J. May

A STUDY OF GAMING IN IOWA

I. Introduction
   - A. General description of available gaming in Iowa
   - B. Citation of involved authorities and code sections

II. Economic Impacts of Gaming in Iowa
   - A. Capital investment
   - B. Number of jobs (payroll)
   - C. Secondary impacts (tourism, etc.)

III. Social Impacts of Gaming in Iowa
   - A. Crime rates
   - B. Compulsive gambling statewide

IV. National Trends and Their Impact on Iowa

V. State of Affairs for Each Iowa Operation

VI. Perceived Regulator and Business Related Obstacles to the Success of Each Venture

VII. Recommendations
A. Policies
B. Legislative

A STUDY OF THE IOWA GAMING INDUSTRY
RECOMMENDATIONS FOR STATUTORY CHANGES
AND MINORITY REPORT

PREFACE

On August 26, 1993, Governor Terry Branstad appointed Lorraine J. May, Chair of the Iowa Racing and Gaming Commission and Dr. Edward J. Stanek, Commissioner of the Iowa Lottery, to head a bipartisan committee to recommend changes in Iowa's gaming laws. Legislative leaders appointed four other members of the committee: Representative Art Ollie, Clinton; Representative Teresa Garman, Ames; Senator Mary Kramer, West Des Moines and Senator Joe Welsh, Dubuque.

Branstad charged the committee with conducting a detailed study of Iowa's gaming industry and asked for recommendations to retain jobs, assist the state's flood recovery efforts, address concerns of communities of gaming and protect the integrity of the state through regulation and control. The Governor asked the committee to report to him as expeditiously as possible.

The Gaming Study Committee wishes to recognize and give thanks to the following for their hard work and contribution to the Committee:

Iowa Racing and Gaming Commission staff

Iowa Lottery staff

Legislative Service Bureau

Department of General Services (Printing, Communications, Mail Room)

All those who submitted written information to the Committee and those who called expressing their opinions on the Gaming Study telephone line

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I. INTRODUCTION

With the exception of bingo and certain low stakes social games, Iowa's experience with formalized gambling began and grew during the 1980s. Chapter 99E of the Code authorized the Lottery and established its charge as maximizing net income while maintaining the dignity of the state and the general welfare of the people.

The purposes of the pari-mutuel (Chapter 99D) and riverboat legislation (Chapter 99F) are the development of horse and greyhound breeding industries, tax generation, economic development and job creation, riverfront development, and promotion of tourism.–

The first pari-mutuel track, Dubuque Greyhound Park, opened June 1, 1985. It was followed by Bluffs Run in February of 1986, Waterloo Greyhound Park in October of that same year and Prairie Meadows in March 1989.

On April 1, 1991, three riverboats began operation on the Mississippi River – the Dubuque Casino Bell, the Diamond Lady and The President. In May of that year, the Emerald began operation with the Mississippi Belle II following in June. The most recent addition, the Sioux City Sue, opened in January of 1993. Three of these boats, the Diamond Lady, the Emerald Lady, and the Dubuque Casino Belle have since elected to move out-of-state.

II. TAX GENERATION AND ECONOMIC IMPACT

Although it is difficult to summarize direct tax revenue in an ever-changing environment, the data on file with the Iowa Racing and Gaming Commission ("Commission") shows the following contributions to general revenue funds of the State on a *calendar year* basis from the pari-mutuel and riverboat industries:

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Note: 1985 through 1988 figures include harness circuit.

THE TOTAL CONTRIBUTION TO THE GENERAL FUND SINCE THE INCEPTION OF PARI-MUTUEL AND RIVERBOAT GAMBLING IS $88,133,552.

In fiscal year 1992 there was a direct contribution from the pari-mutuel and riverboat industries to the General Revenue Fund of approximately $17,650,000 net of all regulatory expense, expenditure by Gamblers' Assistance, DCI and Department of Agriculture allocations.

In addition, the tracks and riverboats have paid. the following taxes in accordance with 99D and 99F to city and county governments:

Calendar Year	Pari-Mutuel Tracks	Riverboats
1985	$ 416,902	
1986	1,861,201	
1987	2,164,619	
1988	2,214,854	
1989	1,996,373	
1990	1,486,582	
1991	1,205,603	$ 644,932
1992	876,576***	699,042

***Net less the $89,810 refunded by Black Hawk County to Waterloo Greyhound Park.

TOTAL CONTRIBUTIONS TO CITY AND COUNTY GOVERNMENTS THROUGH 1992: $13,566,684.

Bluffs Run has also paid $846,055 in property taxes since 1986 which is not included above.

The information concerning direct tax revenue does not take into consideration the tax revenue generated by the economic development. and jobs created as a result of the businesses established by the legislation. It is obviously a more difficult impact to measure as each dollar generated has a multiplier effect in the economy.

Perhaps one should start with the basics. The payrolls for the various licensees in 1992 were as follows**:

Dubuque Greyhound Park (11/91 – 11/92)	$ 1,481,086
Waterloo Greyhound Park (Year ending 5/31/92)	1,405,457
Bluffs Run (calendar year)	3,775,115
Prairie Meadows (calendar year)	2,163,584
Dubuque Casino Belle (calendar year)	5,460,569
The President (calendar year)	14,201,721
Mississippi Belle II (calendar year)	2,233,606
TOTAL	$ 30,721,138

**The Emerald Lady and the Diamond Lady which departed in July 1992 are not included. The above numbers reflect gross salaries and benefits but do not include employer taxes paid. Nor is the amount of Iowa state income tax paid readily available as the state income tax withheld would not necessarily reflect the actual tax liabilities.

In 1992, The President was the SIXTH largest employer in the Quad Cities and Bluffs Run, was Council Bluffs' EIGHTH largest employer when part-time employees are included.

The salary ranges for these jobs obviously vary. For most positions, the riverboat and pari-mutuel industries must compete for employees with other employers in the community. However, even for jobs which would otherwise command only minimum wage in the market, the riverboats must statutorily pay 125% of minimum wage. The President Riverboat reports on average hourly wage (weighted among full-time, part-time and seasonal employees) of $9.11 per hour including reported tips.

In addition, the following amounts have been paid to the trainers, jockeys, kennel operators and owners of racing animals:

Calendar Year	Purses	Dog Promotion	Breeders Awards, Supplements & Iowa Stakes Races
1985	$ 1,463,405		262,049
1986	5,870,375		808,555
1987	6,792,510		1,051,180
1988	6,693,682		1,018,194
1989	9,732,839	7,949	1,012,820
1990	6,850,848	6,834	754,850
1991	6,210,152	14,969	995,610
1992	3,768,946	18,223	1,298,831
TOTALS	**$47,382,757**	**$47,975**	**$7,202,089**

The purses paid have an impact throughout this state as the money is filtered to rural Iowa to pay for the feed, kennels, veterinary services, bedding, equipment and other services needed by the industry.

According to a release from the Department of Agriculture and Land Stewardship dated March 1, 1990, the "breeding, raising and training of race horses is a $50 million industry in Iowa."

The most recent information from the Iowa Department of Agriculture and Land Stewardship concerning the greyhound industry was released in 1988. According to that release:

> "Greyhound racing in Iowa adds an extra $2 million in economic activity to the state's agricultural sector, according to survey results released today by Iowa Secretary of Agriculture Dale M. Cochran. The breeding, caring for, and training of greyhounds used on the racing circuit is included in the agricultural sector of the economy. 'The breeders, owners, and trainers of the dogs used in racing generate this money through the wages they pay, the goods and services they purchase, and the licensing fees and taxes they pay,' said Cochran.
>
> In addition, according to Cochran, greyhound owners have $5.5 million invested in their dogs. . . ."

When that report was prepared in 1988, there were five or fewer Iowa kennels operating at the dog tracks in Iowa. In 1992, there were twenty-seven (27) Iowa-based kennels at the three parimutuel dog tracks in Iowa. While some projections could be made on that basis, the multiplier effect would not be precisely accurate.

With the passage of the pari-mutuel legislation, $87,000,000 was spent in Iowa to build the four race tracks.

The strength of Iowa's gaming laws lies in the required participation of licensed non-profit corporations. These organizations ensure that after-tax profits are invested in the communities they serve. In 1991 the sponsoring non-profits of riverboat operations received $5,197,971, and in 1992 they received $3,818,127, for a total over the twenty-one months of operation of $9,016,098.

Since Bluffs Run began operation, Iowa West Racing Association, as the licensed non-profit for the dog track, reports that it contributed $1,255,189 in 200 grants to charitable organizations in fifty-six communities.

Recipients of riverboat and pari-mutuel profits include entities which provide business growth, tourism and riverfront development; education (scholarships and learning resources); community emergency services (police, fire and rescue); social services (food banks and care facilities) and cultural resources (libraries and the arts). These amounts do not include the sums donated by the sponsoring organizations of the tracks or those funds contributed by the gambling entities as corporate citizens. For example, in 1992, The President Riverboat Casinos contributed an additional $150,000 to charitable causes.

Each of these entities, tracks and riverboats, require services from the community in which they exist. Each purchases a variety of goods and services from food and beverages to electricity to accounting and legal services to flowers and steel beams.

For example, since April 1, 1991, through November 30, 1992, The President has paid $17,331,405 to vendors in the Quad Cities alone. Since inception, Bluffs Run has

purchased more than $24 million in goods, services and utilities from area vendors.

As an outgrowth of the racing industry in Iowa, the Iowa State University Racing Chemistry Section of the Veterinary Diagnostic Laboratory, located in Ames, Iowa, was created and has developed an expertise in drug detection, research and methodology acknowledged internationally. This laboratory was the first in the nation to develop the expertise and capability to test for anabolic steroids in equine. Further, Dr. Walter Hyde, Director of the Racing Chemistry Laboratory was the only representative from the United States to attend and present a research paper at an international meeting in. Zimbabwe. Racing chemists throughout this country, and the world, come to Iowa State University to train in this field.

In recognition of its premiere expertise in racing chemistry, the Iowa State University Laboratory was recently awarded a contract to serve as the research and reference lab for the Association of Racing Commissioners International, an organization representing state and foreign countries. This contract, in the first year, brought $300,000 of out-of-state research funds into the State of Iowa, funds which had previously (since 1965) been directed to Ohio State University.

In addition, Iowa State University currently provides testing services for the State of California. During the first ten months of the contract, more than $120,000 was received. The laboratory also has a four-year contract with the State of Kansas. Receipts from that contract during the first year (July 1, 1991 through June 30, 1992), totalled $327,238.

As a direct result of the pari-mutuel industry in Iowa and the expertise developed at Iowa State University in response to that industry need, Iowa State University has become the acknowledged leader in racing chemistry. The laboratory regularly employs seventeen individuals at a combined annual salary, including benefits, of $473,424. Those salaries are funded entirely by racing chemistry revenue.

One of the stated purposes of the riverboat legislation was riverfront development. The riverfront in many of our cities had deteriorated with lack of use in recent years. With the arrival of the riverboats, the areas were renovated.

According to the information received from the cities and licensees, the following amounts have been expended in riverfront development with the arrival of the riverboats:

Davenport

The City spent approximately $289,000 in connection with the riverfront renovation in recent years, most of which were legal or consultant fees

The President Riverboat Casinos spent $3,192,800 on the levy and $650,000 on facility improvements on the waterfront.

Clinton

In Clinton, the boat operator spent approximately $1,000,000 and the City expended approximately $500,000 to develop the riverfront area.

Dubuque

$7.7 million has been spent in the development and renovation of the riverfront in Dubuque. The City advanced $4 million on the project and this amount was fully reimbursed by the nonprofit licensee in the first eight months of operation. The $3.7 million balance was paid by the operator.

Sioux City

The City has spent approximately $850,000 on riverfront development; the boat operator has made no cash expenditure on permanent waterfront development.

Fort Madison-Burlington-Keokuk

The City of Fort Madison spent $2.6 million in developing their riverfront with the anticipation that riverboat gambling would be in their community for years to come. The City of Burlington invested approximately $50,000 with the operator investing another $35,000. In Keokuk, the city invested $1 million in riverfront development.

After paying back its $3.5 million start-up loan in 1985 after its first three weeks of operation, the Lottery has acted as an enterprise. The General Fund bears no financial responsibility for the Lottery and no tax dollars are used in its operation. The Lottery generated $56 million for the General Fund in fiscal year

* * *

Further, contrary to stereotype, an Iowa Poll taken in 1991 reported that the poorest Iowans are the *least* likely

to gamble. Only 39 percent of those Iowans with family incomes of less than $15,000 a year said they gamble. Forty-seven percent of those with incomes of $50,000 or more reported that they gamble. See Exhibit "E" attached hereto for specific information concerning the Iowa Poll.

IV. STATE OF THE INDUSTRY

A. National Trends.

In addition to several states adopting legislation legalizing limited forms of casino gaming, the passage of the Indian Gaming Regulatory Act (IGRA) of 1988 has spawned an explosion of full scale casinos on tribal reservation land in many states. IGRA requires states to negotiate a compact in good faith with tribes who desire to conduct gaming operations on their reservations of a type which is permitted by the state.

Iowa has entered into compacts with the only three tribes with reservation land in Iowa. Two of Iowa's neighbors, Minnesota and Wisconsin, have witnessed the construction of in excess of fifteen casinos in each state. Iowa residents are patronizing the Iowa and Minnesota tribal casinos in large numbers.

After Iowa passed the first all encompassing riverboat gambling legislation in 1989, Illinois responded with riverboat enabling legislation. The Illinois law removed many of the restrictions and limitations contained in the Iowa law. The result has been a better competitive business environment in Illinois and Illinois has now wrested control of the Mississippi River from Iowa in the riverboat arena.

Casino gambling, particularly the wide spread growth of landbased tribal casinos, has had a devastating effect upon pari-mutuel facilities nationwide. Experience has demonstrated wagering at pari-mutuel facilities will decline 40 to 60% in the first two years following introduction of casinos in the same market.

Minnesota's only horse track has closed and left a burgeoning horse breeding industry floundering. Wisconsin is now facing the closing of three greyhound tracks constructed in 1990 prior to the introduction of casino gambling.

This scene is and will be played out in every state across the country during the 90's except in Utah and Hawaii where no forms of legal gambling exist. Pari-mutuel facilities are attempting to diversify their product to meet the competition. Some are aligning themselves with Nevada gaming operators to obtain riverboat licenses as the Dubuque Racing Association did with a local operator. The Nevada operators are meeting the competition for the gaming dollar by expanding their market base into other states where gaming is now legal.

Other pari-mutuel operators are attempting to utilize their existing facilities by installation of various electronic gaming machines. Lincoln Greyhound Park in Rhode Island and Mountaineer Park in West Virginia both have forms of video lottery games. In Louisiana horse tracks offer coin-operated machines (a limited number are offered at truck stops and lounges) at their race tracks and off-track betting facilities.

As tribal casinos and riverboats continue to mushroom throughout the nation, pari-mutuel facilities must adapt to the changing business environment. If not, these

facilities and the industries for which they serve as a support system will go the way of the dinosaur.

Attached hereto as Exhibit "B" is an account written by Maury Wolff which originally appeared in the 1993 *North American Gambling Abstract* and which was presented in a September, 1993, seminar sponsored by the National Conference of State Legislatures.

B. Impact on Iowa

Iowa's riverboats have suffered due to the competitive environment along the Mississippi River. The graphs attached as Exhibit "C" illustrate the effect of recent market changes on the President Riverboat.

The Iowa Lottery set new monthly sales records in May, 1993, then again in June and then again in July. Floods throughout Iowa took their toll on the impulse sales of scratch tickets through the summer. The Nebraska Lottery was started in September, 1993. It is expected that the Iowa Lottery will lose about 2% of its total sales as a result of the availability of scratch tickets within Nebraska borders. The Iowa Lottery may lose another 3% of total sales when Nebraska begins selling Powerball tickets – scheduled for April 1994. Iowa is now surrounded by lottery competition; the states of Wisconsin, Minnesota, South Dakota, Nebraska, Kansas, Missouri and Illinois now all have lotteries.

Any expansion of gaming in Iowa could have an impact on Iowa's lottery sales and profits. The addition of any new gaming facilities always provides the potential for cannibalizing the spending at other gaming facilities. This has been the case in Iowa and elsewhere across the country

as new tracks and casinos have been added to the gaming mix.

The pari-mutuel industry in Iowa has not been spared. The graphs attached as Exhibit "D" depict the sharp decline in business with noteworthy dates indicated.

V. CONSIDERATIONS

In connection with its charge, the Gaming Study Panel met twice and has solicited and received over 1300 telephone calls and more than a hundred written submissions. In addition, the members have compiled information available in the State offices including the Iowa Racing and Gaming Commission and the State Lottery and taken notice of the gaming industry on a local, regional and national level.

Some of the information received cautions against gaming's potential impact on social values and behavior. Much of it defines the current economic value of various aspects of Iowa's gaming industry. The number of jobs involved means that gaming operations have a significant presence in the functioning of local economies, if not the state economy as a whole. Iowa's riverboats are currently profitable. The Lottery has made substantial contributions to the state treasury. Although the state's only thoroughbred track has had difficulty making a profit, all of Iowa's dog tracks were operated profitably until more racing facilities were added in the surrounding region while riverboat casinos and Indian casinos were added to the competitive mix.

Chapters 99D, 99E, and 99F were enacted by the Iowa legislature to promote economic development, increase

jobs, generate tax revenue and support riverfront development. The Iowa Lottery, the pari-mutuel industry and the riverboats have substantially met those purposes with no evidence of increased crime rate and negative societal impacts. Given the changing regional gaming environment, legislative amendments are necessary to preserve these economic benefits.

Although the Iowa riverboat casinos that remain on the Mississippi operate profitably, they operate at a disadvantage relative to newly-authorized riverboats across the river in Illinois. The bet limits and loss limits originally designed to protect the consumer from compulsive gambling have had their purpose frustrated since no limits apply just a mile across the water to the east. The perception on the part of casino patrons is that the application of bet limits in particular works against them and in favor of the house, since the patron has no control over the size of the bet in circumstances favorable to the patron. Therefore some of these patrons frequent the riverboats in Illinois.

With the downturn in attendance associated with this particular perception, Iowa's riverboat operators are inclined to move their investments to where a greater return can be realized. In particular, the President Riverboat in Davenport had 693 active employees as of September 5, 1993. This was 561 full-time equivalents. In addition, the President accounts for millions of dollars in spending on provisions and other logistical considerations with the immediate economy in the Quad Cities area. Prompt action is required to save these jobs and the economic development associated with them.

Iowa's thoroughbred racing facilities are encumbered by a statutory requirement for a minimum. number of days of live racing. Actual experience has shown that the track cannot operate profitably for a number of these days because of high overhead, the size of the market in which it is located, the need to provide adequate purses and the overlapping of seasons from competing facilities. The statutory requirement does not take into account the dynamics of marketing and the challenges of managing a successful enterprise. Tracks should not be required to have more races than they can handle profitably. The legislature should look at providing the flexibility to allow the Racing and Gaming Commission to approve changes in live racing requirements.

There remains the problem of Iowa's pari-mutuel racing facilities losing money. All of the tracks have financial problems, although some more acutely than others. It appears clear that the addition of slot machines to the tracks would raise additional revenue. From experience elsewhere in the county, the immediate competition from slot machines might reduce the betting on horses and dogs by as much as 40%.

Those agricultural industries (race horse and greyhound breeding and training) are dependent upon a location to display their products in order to survive economically; the closure of the tracks (and the Iowa Bred supplements which follow) will essentially eliminate those agricultural businesses. Any provisions which operate to benefit the track should insure that a reasonable portion of the profits off other gaming interests filter back to the, agricultural interests which the pari-mutuel legislation was created to support.

On the other hand, the overbuilding of gaming operations, such as the number of casinos in Deadwood, South Dakota where 60% of the operations lost money last year and in Atlantic City where nine casinos have filed for bankruptcy, indicates that an overexpansion of the gaming industry even in the lucrative casino business does not assure success.

It has been estimated by the study produced by a consultant retained by the Dubuque Racing Association that up to $100 million in slot machine revenues could be produced with the addition of slot machines at Iowa's four tracks. There was, however, no attempt to determine the source of these revenues and what economic displacement might occur by moving money from elsewhere in the economy to spending at these facilities. It is likely that a large portion of these revenues would come at the expense of wagering at Indian casinos already in operation in the state. It is also possible that these land-based slot machine operations will compete with riverboats for customers and will compete with the Iowa Lottery for gaming income. In the time available it has not been possible to determine how much of the Lottery's $56 million contribution to the state treasury would by jeopardized. There is also no study available to determine the effect of additional gaming on other elements of the hospitality industry such as bars and bowling alleys.

Iowa's Indian tribes are concerned about the proliferation of slot machine complexes next to major population centers which have the potential for diverting customers away from the casinos on their trust lands. The Omaha Indian Tribe of Nebraska has told members of the gaming study panel that unemployment on their Iowa trust lands has declined from 70% to 0% because of Indian casinos and

that 1200 non-Indian jobs have been created on the trust lands to operate their facilities.

All three Indian tribes which operate casinos in Iowa have expressed an interest in discussing options with the State that could be viewed as mutually beneficial. There are two advantages in structuring an arrangement with Iowa's Indian tribes: 1) It offers a unique opportunity to negotiate a state-wide containment of gaming when the State currently have no opportunity to limit amount of gaming on the trust lands. 2) There is the potential for increased revenue to the state.

The panel identified and discussed a number of options available:

1. Close all gaming operations in the State of Iowa
2. Maintain the current legislative structure
3. Raise the limits on riverboats with no slot machines/casinos at the tracks OR slots machines/casinos at the tracks with limits on riverboats unchanged.
4. Allow slot machines at existing pari-mutuel tracks and eliminate limits on riverboats
5. Compact between the State of Iowa and the Indian tribes
6. Video lottery machines/slot machines/off-track betting at taverns, convenience stores and neighborhood location.

The first and sixth options were unanimously rejected by the panel.

Although the sentiment was not unanimous, the majority of the panel believes that maintaining the current legislative structure is not a viable option. Even if the current legislative structure in Iowa remains unchanged, the gaming industry in this state will remain subject to external market influences, legislative amendments in surrounding states, federal legislation, and continued expansion of Indian gaming. It is simply not possible to maintain the status quo.

If the stream of revenue is to be maintained, if the economic development is going to continue, if the agricultural industries which receive their income from the parimutuel tracks are to survive, change in the legislation is required. To do nothing in response to these changing forces insures the demise of the nonprofit sector of the industry and its revenue while the state experiences a continued expansion of gambling in areas over which it has little or no control and from which it receives no revenue.

The argument has been made that the gaming industry should be allowed to fail; the legislature should not be required to insure its success or the success of any business venture. The argument is not persuasive, however, when the gaming businesses in this state do not operate in a free market economy.

The circumstances under which gaming can be conducted in this state are specific and limited. The state does not, however, mandate that farmers plant only corn when the market will only support soybeans; it does not limit the number of acres on the farm which can be used for revenue generation without subsidizing the farmers on whom the restriction is placed; it does not then permit an

environment in which the farmer across the road is free to plant what he wants, where he wants, and as much as he wants to the further economic detriment of his neighbor. It should not be surprising that the farmer whose ability to compete is constrained by state law would then look to the state for relief.

The belief that a decision to maintain the status quo will eliminate the expansion of gambling in this state is misplaced. The state cannot limit the amount of gaming available on the Indian reservations. In the first year of operation, the Winnebago Tribe built and expanded into a thirty thousand square foot facility. The Omaha Tribe and the Mesquaki Tribe are at varying stages of plans for expansion. The Mesquaki Tribe currently has a facility of approximately thirty thousand square feet and is looking to add an additional forty-five thousand square feet of space.

The report submitted to the Gaming Study Panel *Gaming Considerations at Dubuque Greyhound Park*, gives evidence of an unmet market for gambling in this state. The observations and reports of visitors to the Indian gaming facilities confirm the finding of the study. With lines waiting to get into the facility on weekends, it is evident that the market demands more gambling of the type and variety now provided at those operations.

Iowa residents will continue to patronize tribal casinos in Iowa as well as riverboats and casinos in adjacent states.

The challenge is, therefore, to maximize the benefits and limit the negative aspects to the greatest extent possible.

VI. GAMING STUDY RECOMMENDATIONS

The Panel recommends the following:

1. Continued dialogue with the Indian tribes. To date, there has been no one in a position to negotiate proposals with the tribes. The tribes have been left in a position of unilaterally making proposals and waiting for response from a panel which has no authority to proceed.

The Gaming Study Panel recommends that the State appoint a state representative to negotiate options with the Indians which serve the goals of overall containment of gaming in this state, maintenance of jobs and economic development, maintaining the integrity of the games with appropriate regulation and revenue generation.

2. Eliminate the limits currently in place for riverboats including the five-dollar wager, two hundred-dollar loss, thirty percent maximum gaming space restriction and certain cruise limitations in Sections 99F.4, F.7, and F.9 of the Iowa Code. As currently structured, a local referendum is required on the most significant of these changes and should be retained. Iowa Code section 99F.10(c).

3. Tracks should not be required to have more races than they can handle profitably. The legislature should look at providing the flexibility to allow the Racing and Gaming Commission to approve changes in live racing requirements.

Under any option, the tracks must provide some live racing and a portion of their receipts must support purses and the agricultural industries which 99D was designed to create.

4. From the information submitted to the study panel, additional options are required to save the Iowa pari-mutuel racing industry, such as a negotiated relationship with Indian tribes as explained above or the introduction of slot machines at the tracks.

If the legislature and the governor adopt language permitting slot machines at the tracks, the following are two alternatives for consideration for apportionment of revenues:

A. Currently the riverboats pay 20% of their adjusted gross revenues over $3 million to the State. Because the land-based casinos could function with a lower operating cost, the state should receive 8% of adjusted gross revenues up to $1 million, 12% of adjusted gross revenues from $1 to 3 million and 24% of adjusted gross revenues over three million.

B. Alternatively, the revenue distribution as adopted in Rhode Island is an option. In Rhode Island, the legislation provides a distribution of revenue as follows: 38% of adjusted gross to the Lottery, 33% to the track or licensee, 10% to the owners of kennels under contract to the track (no horse tracks in Rhode Island), 18% for operations and communications and the balance to local governments.

If slot machines are installed, the Governor and the legislature should determine whether the pari-mutuel licensees may negotiate with any or all of the Indian tribes, the lottery or private enterprises to provide electronic gaming equipment and services at the facility or forego the installation of the same.

As these and perhaps other alternatives are considered, a study should be undertaken by an objective third party not paid for by any of Iowa's vested gaming interests to make an impartial evaluation of the economic impact of the various alternatives, the economic effect of the change, job creation, retention or displacement, effect on other competing interests such as the hospitality industry, the lottery, the Indian casinos and the riverboats and the net impact on the state.

The gaming issue is a very contentious one among Iowans. Some Iowans feel strongly that gaming is not a desirable industry for their community. Other communities have invested heavily in the gaming industry. These communities depend upon a healthy industry for jobs, economic development, revenue and debt retirement on facilities. Therefore, the panel recommends that changes to allow electronic gaming machines in current pari-mutuel facilities be subject to approval by the voters of those counties in a manner similar to that required in 99F.10(c).

5. Funding of the Gamblers' Assistance Program should be reviewed and increased to meet demonstrated increasing need.

6. The panel recommends the endowment of a research chair funded by gambling taxes for the purpose of ongoing research concerning economic and social effects of gambling on the State of Iowa.

* * *

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION, Plaintiffs, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, - Defendant.	EQUITY NO. 36601 RACETRACK PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT (ORAL ARGUMENT REQUESTED)

Pursuant to Iowa Rule of Civil Procedure 237, the Racing Association of Central Iowa d/b/a Prairie Meadows Racetrack and Casino ("RACI"), the Dubuque Racing Association, Ltd. d/b/a Dubuque Greyhound Park & Casino ("DRA"), and Iowa West Racing Association d/b/a Bluffs Run ("IWRA") (collectively "Racetrack Plaintiffs") cross-move for summary judgment and in support thereof state as follows:

1. This case involves a constitutional challenge to the second sentence of Iowa Code § 99F.11, which imposes a discriminatory tax on the adjusted gross revenues from gambling games at racetracks. The adjusted gross revenues from gambling games at racetracks are taxed at a current rate of 28 percent, which will escalate to 36 percent. The adjusted gross revenues from the same

games on excursion gambling boats are taxed at a rate of 20 percent.

2. No legitimate, rational basis supports this distinction, and none of the supposed justifications for the discriminatory tax offered by the Defendant are sufficient. Racetrack Plaintiffs contend that there is no genuine issue of fact that this discriminatory tax violates the U.S. and Iowa constitutional guarantees of equal protection set forth in the Fourteenth Amendment to the U.S. Constitution and Art. 1 § 6 of the Iowa Constitution.

3. Racetrack Plaintiffs are entitled to: (a) a judgment that the discriminatory tax is unenforceable; (b) an injunction against further collection of the tax; and (c) refund of past amounts that have been collected from Racetrack Plaintiffs in excess of the 20 percent rate.

4. In support of this cross-motion, Racetrack Plaintiffs incorporate the accompanying Brief and the accompanying Statement of Undisputed Material Facts In Resistance To Defendant's Motion For Summary Judgment And In Support Of Racetrack Plaintiffs' Cross-Motion For Summary Judgment together with affidavits and exhibits.

5. By stipulation of the parties, oral argument has been scheduled on this cross-motion for October 11, 2000.

WHEREFORE, Racetrack Plaintiffs request that their cross-motion be granted, and that the Court enter a declaratory judgment that the discriminatory tax is unconstitutional, an injunction against future tax collections, and an order requiring refund of past collections in excess of the 20 percent rate levied on the same games on excursion gambling boats.

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IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD., and IOWA WEST RACING ASSOCIATION, Plaintiffs, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	EQUITY NO. 36601 RACETRACK PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN RESISTANCE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF RACETRACK PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Pursuant to Iowa Rule of Civil Procedure 237(h), the Racing Association of Central Iowa d/b/a Prairie Meadows Racetrack and Casino ("RACI"), the Dubuque Racing Association, Ltd. d/b/a Dubuque Greyhound Park & Casino ("DRA"), and the Iowa West Racing Association d/b/a Bluffs Run ("IWRA") (collectively "Racetrack Plaintiffs") submit the following statement of undisputed material facts:

I. THE PARTIES.

1. Plaintiff RACI is a nonprofit corporation that operates a pari-mutuel racetrack and casino known as Prairie Meadows Racetrack and Casino ("Prairie Meadows")

in Altoona, Iowa, pursuant to Iowa Code chapters 99D and 99F. Farinella Aff. ¶ 2.

2. Plaintiff DRA is a nonprofit corporation that operates a pari-mutuel racetrack and casino known as Dubuque Greyhound Park & Casino ("Dubuque Greyhound Park") in Dubuque, pursuant to Iowa Code chapters 99D and 99F. Hoeger Aff. ¶ 2.

3. Plaintiff IWRA is a nonprofit corporation that holds the gaming license and owns the slot machines for Bluffs Run Racetrack and Casino ("Bluffs Run"), a pari-mutuel racetrack and casino in Council Bluffs, Iowa, pursuant to Iowa Code chapters 99D and 99F. Payne Aff. ¶ 2.

4. Plaintiff Iowa Greyhound Association ("IGA") is an organization of greyhound owners that race at Dubuque Greyhound Park and Bluffs Run and is the entity selected by the Iowa Racing and Gaming Commission to receive and distribute greyhound purses supplements. Hoeger Aff. ¶ 10.

II. THE RACETRACK PLAINTIFFS' PARI-MUTUEL RACING ACTIVITIES AND CONTRIBUTIONS.

5. Prairie Meadows commenced business in 1989 solely as a pari-mutuel horse track. However, it was unable to profitably operate and, in 1991, filed for bankruptcy. Prairie Meadows has consistently lost money on its horse related activities and could not survive without the revenues generated by slot machines. Farinella Aff. ¶¶ 3-4.

6. Dubuque Greyhound Park commenced business in 1985 solely as a pari-mutuel dog track. Its greyhound

operations were increasingly profitable from 1985-1989 and then from 1990-1995, such operations reversed and became increasingly unprofitable, resulting in substantial losses in 1992-1995. Hoeger Aff. ¶ 4. If the DRA had not obtained authorization to operate a casino, the Dubuque Greyhound Park "would long ago have cased operations." Hoeger Aff. ¶ 8.

7. Bluffs Run was on the verge of financial insolvency in 1993 and would not have survived without the slot machine revenues authorized by the 1994 Iowa Legislature. Welch Aff. ¶¶ 3-4; Payne Aff. ¶¶ 3-4.

8. Although the Racetrack Plaintiffs are dependent on slot machine revenues to survive, the Iowa Legislature, in Iowa Code Section 99F.6(4)(a) indicated they should use their slot machine revenues to pay off their debts, supplement horse and dog purses, and for educational, civic, public charitable, patriotic or religious uses as defined in Iowa Code Section 99B.7(3)(b).

9. Each of the Racetrack Plaintiffs continue to lose money on the racing portion of their operations. Farinella Aff. ¶ 21; Hoeger Aff. ¶¶ 4 and 8; Welch Aff. ¶ 10; Payne Aff. ¶ 6.

10. Prairie Meadows has entered into five year agreements with representatives of the Iowa horse industry wherein it has paid and will continue to pay millions of dollars in horse purses and horse purse supplements. Farinella Aff. ¶¶ 5 and 9. Further, Prairie Meadows has constructed various horse-related improvements to its facilities costing millions of dollars to maintain and/or improve the quality of horse racing at Prairie Meadows. Farinella Aff. ¶¶ 6 – 8. In accordance with Iowa Code Section 99F.6(4)(a), Prairie Meadows has distributed over

$186 million to Polk County and over $12 million to various charities from 1995 through 1999. Farinella Aff. ¶ 20.

11. DRA has paid greyhound purse supplements in excess of $6 million from 1995 through 1999. Hoeger Aff. ¶ 12. Further, from 1985 through 1999, DRA has distributed over $7.5 million to charities and over $27.5 million to the City of Dubuque. Hoeger Aff. ¶ 3.

12. From 1996 through 2000, Bluffs Run will have provided approximately $35 million in subsidies from slot machine revenues to Iowa greyhound breeders. Further, during such time period, it estimates that the operating losses from greyhound racing at Bluffs Run is at least $10 million. Payne Aff. ¶ 6. Further, it has made millions of dollars of improvements to its racetrack and facilities. Welch Aff. ¶ 7. Since 1995, and in accordance with Iowa Code Section 99F.6(4)(a), IWRA has given over $45 million to various organizations. Payne Aff. ¶¶ 13-14.

13. Without their slot machine revenues, Racetrack Plaintiffs could not pay the aforesaid purses or make the aforesaid improvements. Farinella Aff. ¶ 12; Payne Aff. ¶ 7; Hoeger Aff. ¶ 8.

14. The costs of operating the racetracks are not, as a group, lower than the costs of operating the riverboats. Farinella Aff. ¶ 11 and Exhibit D thereto; Welch Aff. ¶ 16.

15. The Iowa Racing and Gaming Commission has acknowledged the important, positive impact that the racetracks have contributed to Iowa and its economy. (Exhibit 5 to Brief In Support of Defendant's Motion For Summary Judgment, at pages 7-10) and Farinella Aff. ¶ 13.

16. An independent study prepared in May, 1998 by Ames Economic Associates noted that the Iowa horse industry is a major agriculturally related industry in this state with far reaching impact, and emphasized the importance of Prairie Meadows to such industry. Farinella Aff. ¶ 14 and Exhibit E thereto.

III. THE RIVERBOATS.

17. Unlike the racetracks, the operators of the riverboats are for-profit and are not required to turn over their income for public, civic, charitable purposes, etc. pursuant to Iowa Code Section 99F.6(4)(a). Note: the non-profit "qualified sponsoring organization" holding the riverboat gaming license must comply with the foregoing Code Section, to the extent it receives distributions from the for-profit company which actually operates the riverboat, but the operating company retains the profits.

18. Unlike the racetracks, the riverboats are not required to support a separate industry (horse and dog breeding and racing). Iowa Code Sections 99D.8 and 99F.6(4)(a).

19. Unlike the racetracks, the riverboats may offer table games. Ketterer's Aff. ¶ 12.

IV. THE HISTORY OF THE GAMING TAX DISCREPANCY.

20. In 1994, the Iowa Legislature enacted legislation (H.F. 2179) which (a) legalized slot machines at racetracks, (b) eliminated loss limits at riverboats, and (c) provided for a differential wagering tax on gambling games – i.e., 20 percent of adjusted gross receipts when the games are

conducted at riverboats, but escalating to 36 percent when they are conducted at racetracks. See Flynn's Affidavit with attached legislative history of H.F. 2179.

21. However, prior to commencement of the 1994 session of the Iowa Legislature, a consensus agreement was reached among representatives of the racetrack and riverboat interests, and legislators from the affected areas, which supported (a) slot machines at racetracks, (b) elimination of loss limits at riverboats and (c) the same 20% gaming tax at racetracks and riverboats, all as evidenced by amendment H-5333 to H.F. 2179. Bisignano Aff. ¶¶ 4-5; McCoy Aff. ¶¶ 4-5; Siegrist Aff. ¶¶ 4-5; Gronstal Aff. ¶¶ 4-5.

22. When the legislation reached the Iowa House, Steve Hansen, a representative from Woodbury County, which contained a riverboat (and no racetracks), filed an amendment (H-5391) which established a higher, differential tax (40%) on gambling games at racetracks, which amendment passed. Subsequently, on the same day, he agreed to have his amendment reconsidered so that the highest rate on gambling games at racetracks would be 36 percent rather than 40 percent of adjusted gross receipts, and to provide a two-year moratorium (i.e., until January 1, 1997) for the differential tax rate to take effect in order to give racetrack supporters a chance to repeal the tax disparity in the next General Assembly. H.F. 2179, as so amended, passed the House and Senate. Bisignano Aff. ¶¶ 7-8; McCoy Aff. ¶¶ 7-8; Siegrist Aff. ¶¶ 7-8; Gronstal Aff. ¶¶ 7-8.

23. The Gaming Study Committee never discussed or contemplated a gaming tax disparity of such degree between riverboats and racetracks Kramer. Aff. ¶ 5.

V. NO OTHER STATE HAS SUCH A TAX.

24. In other states in the nation which allow slot machines and/or video lottery terminals, they are taxed for the most part at the same rate regardless of where the machine is located. For example, this is true in Montana, Nevada, Oregon, South Carolina, and South Dakota, which currently allow slot machines and/or video lottery terminals in several different kinds of enterprises. Christiansen Dec. ¶ 2.

25. Louisiana, the only other state besides Iowa that authorizes slot machines on riverboats and at racetracks, has a slightly lower tax rate (18 percent vs. 18.5 percent) for slot machines at racetracks. Christiansen Dec. ¶ 3.

26. No other state has established a tax rate that is 80 percent higher (36 vs. 20 percent) depending on the location of the device. Christiansen Dec. ¶ 4.

27. Moreover, only one state (Illinois) has an adjusted gross receipts tax on gaming revenues that approaches 36 percent. It recently enacted a tax of 35 percent on adjusted gross receipts above $100 million. (This tax will apply to gaming devices on riverboats. Illinois does not allow these devices in other venues.) However, the effective tax rate is much less than 35 percent because of the $100 million floor. Only riverboats in the Chicago area are expected to be subject to the 35% tax. Significantly, there is one riverboat being moved from the Mississippi River to Rosemont (Chicago suburbs). Under the same legislation, such riverboat will have to pay 15 percent of its adjusted gross receipts into a special state fund to support horse racing. Christiansen Dec. ¶ 5.

XI. THE EXTENT OF HIGHER WAGERING TAXES PAID BY RACETRACKS.

28. Pursuant to Iowa Code Section 99F.11, the adjusted gross receipts from gambling games generated by Iowa riverboats were taxed for calendar years 1997-1999, at the fixed rate of 20%, and for calendar year 2000 and beyond, will continue to be taxed at the fixed rate of 20%.

29. Pursuant to Section 99F.11, the adjusted gross receipts from gambling games generated by the racetracks were taxed at the rate of 22% for the 1997 calendar year, 24% for the 1998 calendar year, 26% for the 1999 calendar year and are being taxed at the rate of 28% for the 2000 calendar year. For the 2001 calendar year, such tax rate shall increase to 30%, and shall increase by 2% each succeeding calendar year thereafter until the rate reaches 36%. Iowa Code § 99F.11.

30. (a) For the 1997 calendar year, Prairie Meadows' adjusted gross receipts were $127,359,259 for which Prairie Meadows paid a 22% wagering tax totaling $27,609,036, which was $2,487,185 more than Prairie Meadows would have paid at 20% if it were an riverboat.

(b) For the 1998 calendar year, Prairie Meadows' adjusted gross receipts were $129,685,257, for which Prairie Meadows paid a 24% wagering tax totaling $30,654,461, which was $5,067,410 more than Prairie Meadows would have paid at 20% if it were an riverboat.

(c) For the 1999 calendar year, Prairie Meadows' adjusted gross receipts were $149,453,670 for which Prairie Meadows paid a 26% wagering tax totaling $38,327,954, which was $8,787,220 more

than Prairie Meadows would have paid at 20% if it were a riverboat.

Accordingly, for calendar years 1997-1999, Prairie Meadows has paid a total of $16,341,815 in wagering taxes more than it would have paid had its adjusted gross receipts been taxed at 20% as were such receipts for Iowa riverboats. Farinella Aff. ¶ 17. If Prairie Meadows' gross receipts for calendar years 2000, 2001 and 2002 remain the same as for calendar year 1999, it will pay $43,936,101 more in wagering taxes for such years than if it were a riverboat taxed at 20%. Farinella Aff. ¶ 19.

31. (a) For the 1997 calendar year, DRA's adjusted gross receipts were $25,840,008, for which DRA paid a 22% wagering tax totaling $5,274,802, which was $456,800 more than DRA would have paid at 20% if it were a riverboat.

(b) For the 1998 calendar year, DRA's adjusted gross receipts were $29,379,819, for which DRA paid a 24% wagering tax totaling $6,581,157, which was $1,055,193 more than DRA would have paid at 20% if it were a riverboat.

(c) For the 1999 calendar year, DRA's adjusted gross receipts were $33,775,722 for which DRA paid a 26% wagering tax totaling $8,251,688, which was $1,846,544 more than DRA would have paid at 20% if it were a riverboat.

Accordingly, for calendar years 1997-1999, DRA has paid a total of $3,358,537 in wagering taxes more than it would have paid had its adjusted gross receipts been taxed at 20% as were such receipts for Iowa riverboats. Hoeger's Aff. Exhibit B. If DRA's gross receipts for calendar years 2000, 2001 and 2002 remain the same as for calendar year 1999, it will pay $9,232,718 more in wagering taxes for

such years than if it were a riverboat taxed at 20%. Hoeger's Aff. Exhibit B.

32. (a) For the 1997 calendar year, IWRA's adjusted gross receipts were $101,780,211, for which IWRA paid a 22% wagering tax totaling $21,981,646, which was $1,975,604 more than IWRA would have paid at 20% if it were an riverboat.

(b) For the 1998 calendar year, IWRA's adjusted gross receipts were $108,539,933, for which IWRA paid a 24% wagering tax totaling $25,579,584, which was $4,221,597 more than IWRA would have paid at 20% if it were an riverboat.

(c) For the 1999 calendar year, IWRA's adjusted gross receipts were $113,556,760 for which IWRA paid a 26% wagering tax totaling $28,994,758, which was $6,633,406 more than IWRA would have paid at 20% if it were a riverboat.

Accordingly, for calendar years 1997-1999, IWRA has paid a total of $12,830,607 in wagering taxes more than it would have paid had its adjusted gross receipts been taxed at 20% as were such receipts for Iowa riverboats. Payne's Aff. ¶ 9. If IWRA's gross receipts for calendar years 2000, 2001 and 2002 remain the same as for calendar year 1999, it will pay $36,000,000 more in wagering taxes for such years than if it were a riverboat taxed at 20%. Payne's Aff. ¶ 12.

BELIN LAMSON McCORMICK
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[Certificate Of Service Omitted In Printing]

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	EQUITY NO. 36601 AFFIDAVIT OF ROBERT FARINELLA

STATE OF IOWA)
) SS:
COUNTY OF POLK)

I, Robert Farinella, being first duly sworn, state under oath:

1. I have personal knowledge of the following facts and would so testify if called as a witness.

2. I am employed as President, Chief Executive Officer and General Manager of the Racing Association of Central Iowa, an Iowa not-for-profit company with its principal place of business in Altoona, Polk County, Iowa, doing business as Prairie Meadows Racetrack and Casino ("Prairie Meadows"). Prairier Meadows operates a pari-mutuel racetrack and casino facility in Altoona, licensed pursuant to Iowa Code Chapters 99D and 99F.

3. Prairie Meadows commenced business on March 1, 1989 solely as a pari-mutuel horse track. As a horse track it was unable to profitably operate and on November

27, 1991, filed a Chapter 11 bankruptcy in the Bankruptcy Court for the Southern District of Iowa. Prairie Meadows emerged from bankruptcy in May, 1993 pursuant to a confirmed plan of reorganization but continued to lose money in 1993 and 1994. Since Prairie Meadows commenced business on March 1, 1989 and continuing through the date of this affidavit, it has consistently lost money on its horse related activities.

4. Without the revenues generated by the slot machines authorized by the 1994 Iowa Legislature and implemented at Prairie Meadows on April 1, 1995, Prairie Meadows would not have survived.

5. Although Prairie Meadows' survival is dependent on its slot machine revenues, its primary legislative purpose is to grow and nurture the Iowa horse industry. In that regard, on September 24, 1997, it entered into a certain Five Year Agreement Re Horse Purses ("Purse Agreement") with the Iowa Division of the Horsemen's Benevolent and Protective Association, Inc. and the Iowa Quarter Horse Racing Enterprise, Inc., as representatives of the Iowa thoroughbred and quarter horse industries, a copy of which is attached hereto as Exhibit A, wherein Prairie Meadows agreed to pay the following purses:

	1998	1999	2000	2001	2002
Purses:	$10,312,521	11,849,902	$13,653,246	$15,052,704	$16,595,606
Iowa Supplements:	2,062,504	2,369,980	2,730,649	3,010,541	3,319,121
Total Purses and Supplements	$12,375,025	$14,219,882	$16,383,895	$18,063,244	$19,914,727

6. As noted in Paragraph 2 of such Purse Agreement, Prairie Meadows also committed to make certain improvements to its facilities (which facilities are leased from Polk County) to construct a training track, a turf track, two barns, a viewing stand, a new starting gate, a horse pavilion, and dormitory facilities, all of which were deemed essential to maintain and/or improve the quality of horse racing at Prairie Meadows.

7. Since execution of the Purse Agreement, Prairie Meadows has constructed the following horse-related improvements at its facilities:

Improvement	Cost
Training Track	1,570,677
Horse Barns	1,226,379
Viewing Stand	41,572
Dormitory	1,022,148
Horse Walkers	$196,270
Video/Tote Board	$1,749,186

Further, pursuant to a certain First Amendment to the Purse Agreement dated December 31, 1999, a copy of which is attached hereto as Exhibit B, Prairie Meadows has agreed to make additional horse-related improvements as follows:

Improvement	Year of Construction	Estimated Cost
Turf Track	2003	$6,000,000
Jockeys' Quarters & Paddock	2003	2,000,000
Three Dormitories	2003, 2005 and 2006	5,000,000
Horse Pavilion	2005	1,250,000
Starting Gate	2005	60,000

8. The foregoing improvements are in addition to the racetrack, horse barns, paddock, administration building and other horse-related fixtures which were constructed with the original facility and which are required to be continually maintained, repaired, replaced and/or up-graded.

9. In addition to the Purse Agreement, on January 12, 1998, Prairie Meadows entered into a certain Five Year Agreement With Iowa Harness Horsemen's Association ("IHHA Agreement"), as representatives of the Iowa standard bred industry, a copy of which is attached hereto as Exhibit C, wherein Prairie Meadows agreed to pay the following purses:

	1998	**1999**	**2000**	**2001**	**2002**
County or State Fair Purses, etc.	$600,000	$620,000	$750,000	$750,000	$750,000
Purses at Prairie Meadows	-0-	$180,000	$600,000	$600,000	$600,000

10. All of the foregoing purses and horse-related items, and the costs for construction, maintenance, repair, replacement and/or up-grade of same, are unique to Prairie Meadows and not shared by riverboats.

11. As noted by Exhibit D attached hereto, entitled "Operating Expenses As A Percentage of Net Revenues", which was prepared by Prairie Meadows based on financial reports submitted to the Iowa Racing and Gaming Commission for the calendar years 1991-1994 by the then licensed Iowa riverboats and racetracks, the costs of

operating the racetracks are not, as a group, lower than the costs of operating the riverboats.

12, Without its slot machine revenues, Prairie Meadows could not pay the aforesaid horse purses or make the aforesaid horse-related improvements.

13. The 1992 annual report submitted by the Iowa Racing and Gaming Commission to the Governor (Exhibit 5 to the Brief In Support of Defendant's Motion For Summary Judgment) noted the following:

- substantial amounts have been paid by the Iowa racetracks to trainers, jockeys, kennel operators and owners of racing animals. (Page 7).
- The purses paid have an impact throughout Iowa as the money is filtered to rural Iowa to pay for the feed, the kennels, the veterinary supplies, the bedding, the supplies and other services needed by the industry. (Page 7)
- According to a release from the Department of Agriculture and Land Stewardship dated March 1, 1990, the "breeding, raising and training of race horses is a $50 million industry in Iowa" (Page 8)
- As a direct result of the pari-mutuel industry in Iowa and the expertise developed at Iowa State University in response to that industry need, Iowa State University has become the acknowledged leader in racing chemistry. (Pages 9 and 10).
- The pari-mutuel industry is an industry in crisis. (Page 16).

14. Attached hereto and marked Exhibit E is a report prepared in May, 1998 (and without regard to this litigation) by Ames Economic Associates entitled *The Economic Impacts of the Iowa Horse Industry and of Prairie Meadows Live Racing Activities* which states in pertinent part the following:

- On an annual basis, horse racing and breeding, along with horse racing tourism, account for $57.45 million in direct sales and 763 jobs in Iowa. (Unnumbered first page captioned "Overview of Results").
- The Iowa horse industry is a major agriculturally related industry in the state supporting traditional agriculture with purchases of hay and feed grain supplies. Horse owners generate considerable economic impacts, as well, through their investments in facilities and supplies that support their professional and recreational uses of horses. (Page 1).
- Horse purses paid by Prairie Meadows help to support the state horse industry and its affiliated services, which in turn stimulates additional spending and impacts the remainder of the state economy. (Pages 14 and 15).
- The horse purses paid by Prairie Meadows represent an important revenue source for a significant portion of the Iowa horse industry. (Page 11). Were the track not in existence, the viability of this component of the Iowa horse industry would decline. (Page 10).
- Iowa horse owners spent an estimated $47.65 million on horse related activities in 1997. (Page 7)

- In addition to these agriculturally based and horse industry related expenditures, income earned by workers in these activities is spent on consumer services and main street businesses, thereby stimulating other sectors in the state's economy. (Page 8).
- Overall, an estimated $112.32 million of gross sales or output in the (Iowa) economy is related to the horse industry. (Pages 9-10).
- In 1997, Prairie Meadows, from its horse racing activities, and without including horse purses paid, generated an estimated $5.2 million in employment compensation, $8.39 million in total income and $10.79 in total value added benefits. (Pages 11-12).
- Horse racing activities at Prairie Meadows provide a major tourism attraction in central Iowa and draw substantial visitors from surrounding regions as well as provide a major entertainment activity for Des Moines (Page 13-14).

15. Pursuant to Iowa Code Section 99F.11, as amended by the Iowa Legislature in 1994, the adjusted gross receipts from gambling games generated at Prairie Meadows have been taxed at the rate of 22% for the 1997 calendar year, 24% for the 1998 calendar year and 26% for the 1999 calendar year. For the 2000 calendar year, the adjusted gross receipts are being taxed at the rate of 28%, which tax rate will increase by 2% for each succeeding calendar year thereafter until the rate reaches 36%. Iowa Code Section 99F.1(1) defines "adjusted gross receipts" of a licensee as the "gross receipts less winnings paid to wagerers."

16. Pursuant to Iowa Code Section 99F.11, the adjusted gross receipts from gambling games generated by Iowa riverboats were taxed for calendar years 1997-1999, at the fixed rate of 20%, and for calendar year 2000 and beyond, will continue to be taxed at the fixed rate of 20%.

17. (a) For the 1997 calendar year, Prairie Meadows' adjusted gross receipts were $127,359,259, for which Prairie Meadows paid a 22% wagering tax totaling $27,609,036, which was $2,487,185 more than Prairie Meadows would have paid at 20% if it were a riverboat.

(b) For the 1998 calendar year, Prairie Meadows' adjusted gross receipts were $129,685,257, for which Prairie Meadows paid a 24% wagering tax totaling $30,654,461, which was $5,067,410 more than Prairie Meadows would have paid at 20% if it were a riverboat.

(c) For the 1999 calendar year, Prairie Meadows' adjusted gross receipts were $149,453,670 for which Prairie Meadows paid a 26% wagering tax totaling $38,327,954, which was $8,787,220 more than Prairie Meadows would have paid at 20% if it were a riverboat.

Accordingly, for calendar years 1997-1999, Prairie Meadows has paid a total of $16,341,815 in wagering taxes more than it would have paid had its adjusted gross receipts been taxed at 20% as were such receipts for Iowa riverboats.

18. For the 2000 calendar year, Prairie Meadows' adjusted gross receipts through June 30, 2000 were $70,926,260 for which Prairie Meadows has paid a 28% wagering tax of $19,859,353, which is $5,674,101 more

than Prairie Meadows would have paid at 20% if it were a riverboat.

19. if Prairie Meadow's gross receipts for calendar years 2000, 2001, 2002 remain the same as for calendar year 1999 ($149,453,670), Prairie Meadows will pay $43,936,101 more in wagering taxes for such years than if it were a riverboat taxed at 20%, to-wit:

Year	Estimated Adjusted Gross Receipts	Rate	Estimated Wagering Tax	Wagering Tax If Capped @20%	Difference
2000	$149,453,670	28%	$41,257,028	$29,540,734	$11,716,294
2001	149,453,670	30%	44,186,101	29,540,734	14,645,367
2002	149,453,670	32%	47,115,174	29,540,734	17,574,440
				TOTAL:	$43,936,101

20. As a non-profit corporation, and pursuant to Section 99F.6(4)(a) of the Iowa Code, Prairie Meadows is required to distribute its profits "for educational, civic, public, charitable, patriotic, or religious uses as defined in Section 99B.7, subsection 3, paragraph 'b'". In accordance therewith, Prairie Meadows has made the following distributions to Polk County and various charities since it became profitable in 1995:

	1995	1996	1997	1998	1999	Totals
Polk County	$48,058,881	57,817,000	9,200,000	16,484,788	14,475,000	$186,035,669
Charities	43,543	312,610	3,000,000	4,550,000	4,537,063	12,443,216

As a direct result of the escalating gaming tax, Prairie Meadows' profits are substantially shrinking such that by the 2003 calendar year, when the gaming tax is 34%, and by the 2004 calendar year and beyond, when the gaming tax is 36%, it will have little or no profits to distribute. Accordingly, its ability to grow and support the Iowa horse industry, as well as its ability to make distributions to Polk County and charities, will be adversely impacted. Conversely, if Prairie Meadows' adjusted gross receipts were taxed at 20% during such periods, it would have millions of dollars of profits to distribute to Polk County and charities.

21. The gaming/entertainment industry is extremely competitive in Iowa and Prairie Meadows competes for customers with the Iowa riverboats. The Iowa Legislature and the Iowa Racing and Gaming Commission have charged Prairie Meadows with growing the Iowa horse industry. As evidenced above, Prairie Meadows, through its commitment to increase horse purses and make horse-related improvements to its facilities, is attempting to be responsive to such charge. Prairie Meadows loses money on its horse-related activities. The Riverboats are not required to support or grow any industry. The riverboats' operating costs as a percentage to revenues are no greater than the racetracks' operating costs. Prairie Meadows cannot pass on to its patrons the additional gaming taxes it is required to pay and remain competitive with the riverboats. Thus, Prairie Meadows is competitively disadvantaged by the disparate and escalating gaming tax.

/s/ Robert Farinella
Robert Farinella

On this 27th day of July, 2000 before me, a Notary Public, personally appeared Robert Farinella, to me known

to be the person named in and who executed the foregoing instrument, and acknowledged that Robert Farinella executed the same as his voluntary act and deed.

/s/ Mary L. Morrell
Notary Public in the
State of Iowa 5/14/2002

EXHIBIT D

Operating Expenses As A Percentage Of Net Revenues

	1994	1993	1992	1991	AVE%:
Prairie Meadows	91.6	85.0	66.7	92.1	83.9
Bluffs Run	84.4	70.4	65.1	57.8	69.4
Dubuque Greyhound	68.9	92.0	57.5	45.2	65.9
Mississippi Belle II	37.4	60.3	60.3	63.9	55.5
The President	52.0	75.5	71.4	na	66.3
Dubuque Belle	na	51.9	48.7	38.5	46.4
Diamond Jo	58.1	na	na	na	58.1
Catfish Bend	78.0	na	na	na	78.0
Belle of Sioux City	70.1	na	na	na	70.1

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, and DUBUQUE RACING ASSOCIATION, LTD.,	)	
Plaintiffs,	)	
v.	)	EQUITY NO. 36601
MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, and GERALD BAIR, DIRECTOR OF IOWA DEPARTMENT OF REVENUE AND FINANCE,	)	
Defendants.	)	

AFFIDAVIT OF ROGER HOEGER

STATE OF IOWA)
) ss
COUNTY OF DUBUQUE)

The undersigned, being first duly sworn upon oath, deposes and states as follows:

1. I am the Comptroller and Assistant General Manager of the Plaintiff, Dubuque Racing Association, Ltd. ("DRA"). I have been employed with DRA as its Comptroller since March 1985. I regularly assemble and report financial information on DRA's operations, including revenues and taxes for both the dog racing and casino operations. I have personal knowledge of the matters set forth below.

2. DRA is an Iowa not-for-profit corporation formed pursuant to Chapters 99D and 99F of the Iowa Code. DRA is a tax-exempt organization pursuant to section 501(c)(4) of the Internal Revenue Code. DRA's principal place of business is Dubuque Greyhound Park & Casino in Dubuque, Iowa.

3. DRA was established as a non-profit pari-mutuel dog racing licensee in 1984; pursuant to the enacting legislation (Iowa Code Chapter 99D), proceeds of DRA's operations must be distributed to tax exempt charitable organizations and local government. From 1985 through 1999, DRA has 1) distributed $7,591,500 to charities (no contributions were made during the years 1989-1991 and 1993-1994 because of financial exigencies); 2) paid rents and other sums pursuant to state law or contract to the City of Dubuque of $27,649,279; 3) paid taxes to Dubuque County of $2,910,705; 4) paid taxes to and fees to the State of Iowa of $48,381,037; and 5) paid purses to greyhound kennels and dog owners of $22,318,641. As of July 31, 1999, DRA employed 386 people. The total 1999 payroll, including benefits, was $6,808,871. Dubuque Greyhound Park & Casino is a significant source of tourism for Dubuque, drawing substantial numbers of patrons from southwestern Wisconsin and Northern Illinois as well as Iowa.

4. Pari-mutuel dog racing generated significant revenues in its first few years of operations, but the pari-mutuel dog racing industry in Iowa declined drastically in the late 1980s. As shown in the Schedule of Greyhound

Operations-Income (Loss), attached as Exhibit "A",[1] greyhound operations generated increasing net income from inception in 1985 through 1989; in 1990 through 1991, pari-mutuel dog racing income declined drastically and, from 1992 through 1995, generated ever increasing losses. Losses from pari-mutuel dog racing at Dubuque Greyhound Park in 1995 exceed two and one-quarter million dollars. Apparent losses improved after 1995, but this was due primarily to accounting changes that charged all non-direct operating costs of the combined facility to casino operations. The horse racing operation at Prairie Meadows experienced similar problems.

5. In 1989, the Iowa legislature authorized riverboat gambling. Riverboat casinos were authorized to operate "gambling games" of skill (*e.g.*, card games) or of chance (such as slot machines or roulette). Riverboat operations are for-profit entities which are required to be co-sponsored by a qualified non-profit organization. 1989 Iowa Acts Chapter 67; Iowa Code Chapter 99F. Since legislative amendments lifted various restrictions on the amounts that could be wagered or lost on riverboat casinos, and eliminated most of the cruising requirements, riverboat gambling in Iowa has been extremely profitable. The tax imposed on slot machine revenues on riverboat casinos was originally set at 20% for adjusted gross receipts in excess of three million dollars and has never changed.

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[1] All figures used on Exhibits "A," "B", and "C" are based on DRA's fiscal year, which runs from December 1 through November 30.

6. In an effort to salvage Iowa's racing operations and the Iowa dog- and horse-breeding industries that depended on them, the Iowa legislature in 1994 approved amendments to Chapter 99F that permitted licensed pari-mutuel operations to operate "gambling games" that were games of chance (*i.e.*, slot machines) inside their racing facilities, in order to make the operations financially viable and capable of carrying out their original legislative purposes. 1994 Iowa Acts, Chapter 1021, §§ 13, 15; Iowa Code §§ 99F.4A, 99F.6(4).

7. DRA sought and obtained a license to operate a land-based casino. The DRA casino commenced operation in November 1995, and the combined facility is now known as Dubuque Greyhound Park & Casino.

8. The pari-mutuel dog racing component of Dubuque Greyhound Park & Casino's operations has generated losses continually since 1992. The net losses resulting from pari-mutuel dog racing since 1992, taking into account only the *direct* operating costs of dog racing (such as pari-mutuel employment, dog kennels, Totalizator system, television monitors, lure rental, photo finish system, maintenance and depreciation on the oval track, etc.) have totaled $7,236,429 (see Exhibit "A"); this figure would be much higher if other costs (such as building and parking lot rental from the City of Dubuque, depreciation on construction bonds, and administrative overhead) were allocated to pari-mutuel racing operations; this loss figure also does *not* include the racing purse supplements that DRA is required to pay from casino revenues. If DRA had not obtained authorization to operate a casino, DRA would long ago have ceased operations. The viability of DRA is entirely dependent on its revenues from the casino side of the operation; the pari-mutuel dog racing operation is, in

terms of DRA's economics, a substantial cost of having a casino license.

9. Iowa Code section 99F.1(1) defines "adjusted gross receipts" from gambling games as the "gross receipts less winnings paid to wagerers." Pursuant to Iowa Code section 99F.11, as amended, the adjusted gross receipts in excess of three million dollars from the casino gambling games operated by DRA and other pari-mutuel racing licensees were taxed at the rate of 22% for calendar year 1997, 24% for calendar year 1998, and 26% for calendar year 1999. For the 2000 calendar year, the adjusted gross receipts (in excess of three million dollars) are being taxed at the rate of 28%, and the tax rate will increase by 2% for each succeeding calendar year thereafter until the rate reaches 36% of adjusted gross receipts.

10. Pursuant to Iowa Code section 99F.11, the adjusted gross receipts (over $3,000,000) from gambling games generated by Iowa riverboats were taxed from the inception of riverboat gambling to the present at the same rate: 20%. Nor are there any scheduled statutory increases in the tax rate applicable to adjusted gross receipts from gambling games for riverboats beyond the 20% rate that has always applied to them.

11. The table attached hereto as Exhibit "B" summarizes the financial impacts of the two percent annual increases in the gaming tax applicable to DRA's adjusted gross receipts from gambling games, compared to the results using the constant 20% tax applicable to adjusted gross receipts of riverboat casinos, for the years 1997 through 2004. The "Win" and the gaming tax for the calendar years of 1997 through 1999 are based on historical data, while results for the period 2000 through 2004

are based on the 1999 "Win". The table shows that excess gaming tax paid by Dubuque Greyhound & Casino as compared to riverboat casinos on an annual basis has ranged from $456,800 to $4,924,116 for the years 1997 through 2004; the total of excess gaming taxes for the period exceeds $21,800,000.

12. In addition to the direct costs of pari-mutuel dog racing, DRA is also required by statute to contribute a negotiated percentage (subject to mandatory arbitration) of its adjusted gross receipts from casino operations to supplement purses of live dog races, in order to further the primary legislative purpose of the pari-mutuel dog racing industry, namely, the "the development and promotion of Iowa greyhound racing dogs in this state." Iowa Code sec. 99F.6(4)(b), 99D.12. This percentage, like the taxes on adjusted gross receipts from casino operations, is a percentage of adjusted gross revenues (after gaming taxes are deducted), not of net revenues of the casino operation or of the facility as a whole. The "Schedule of Casino Purse Supplements" attached hereto as Exhibit "C" shows the amounts DRA has paid from its adjusted gross receipts from casino operations to supplement purses for live pari-mutuel dog races pursuant to agreements negotiated with the Iowa Greyhound Association, the entity selected by the Iowa Racing and Gaming Commission for such purpose under sec. 99F.6(4)(b) . The supplements paid by DRA from 1995 through 1999 for pari-mutuel racing from casino revenues totals $6,409,756. As noted previously (see ¶ 6, above), the purse supplements are on top of the losses from direct costs of pari-mutuel dog racing.

13. DRA competes with Indian casinos in Iowa and Wisconsin; with Iowa and Illinois riverboat casinos; and with horse and dog racing in Illinois and Wisconsin. DRA

faces the threat of additional casinos in Wisconsin and Illinois on a recurring basis, as most recently shown in the attached article from the Dubuque *Telegraph-Herald* from July 28, 2000 about a proposed Indian casino in Darlington, Wisconsin, approximately 45 miles from Dubuque.

14. DRA competes directly with Iowa riverboat gambling operations but pays substantially higher taxes on gross revenues from those operations than the competing riverboat operations; in addition to the much higher taxes paid to the State as a result of DRA's status as a pari-mutuel licensee, DRA is required to pay an additional portion of those same adjusted gross receipts as supplements for live races. At some point the combination of the higher gaming taxes on gross receipts, coupled with market maturity, will likely result in a loss on casino operations, which combined with the present losses in greyhound operations would bring about inevitable closure of the facility and the loss of the substantial economic and employment benefits that DRA provides, not only in the local community but to the State of Iowa as well.

/s/ Roger Hoeger
Roger Hoeger

Subscribed and sworn to before me this 31st day of July, 2000.

/s/ Cathy J. Dillon
Notary Public

My Commission Expires:
April 25, 2003

[Certificate Of Service Omitted In Printing]

Schedule of Greyhound Operations Income (Loss)	
Year	
1985	$452,204
1986	$2,214,931
1987	$1,947,508
1988	$2,488,188
1989	$2,738,093
1990	$883,770
1991	$250,449
1992	$(650,729)
1993	$(1,499,930)
1994	$(1,420,651)
1995	$(2,296,042)
1996	$(163,489)
1997	$(317,232)
1998	$(375,333)
1999	$(513,023)

Notes to User:
All figures based on DRA fiscal year, Dec. 1- Nov. 30
1) Casino Operations commenced November 22, 1995.
2) The Greyhound Operations reflect direct revenue and expenses; the operation is not allocated shared overhead expenses.

EXHIBIT "A"

Year	Actual/Proj. Win	Rate	Actual/Proj. Wagering Tax	If Capped @ 20%	Annual Difference	Cumulative Difference
1997	$25,840,008	22%	$5,274,802	$4,818,002	$456,800	$456,800
1998	$29,379,819	24%	$6,581,157	$5,525,964	$1,055,193	$1,511,993
1999	$33,775,722	26%	$8,251,688	$6,405,144	$1,846,544	$3,358,537
2000	$33,775,722	28%	$8,867,202	$6,405,144	$2,462,058	$5,820,595
2001	$33,775,722	30%	$9,482,717	$6,405,144	$3,077,573	$8,898,168
2002	$33,775,722	32%	$10,098,231	$6,405,144	$3,693,087	$12,591,255
2003	$33,775,722	34%	$10,713,745	$6,405,144	$4,308,601	$16,899,856
2004	$33,775,722	36%	$11,329,260	$6,405,144	$4,924,116	$21,823,972

All figures based on DRA fiscal year, Dec. 1- Nov. 30

EXHIBIT "B"

Schedule of Casino Purse Supplements	
Year	
1995	$22,183
1996	$1,201,529
1997	$1,431,085
1998	$1,701,045
1999	$2,053,914
Note to User:	
All figures based on DRA fiscal year, Dec. 1- Nov. 30	
Casino Operations commenced November 22, 1995.	

EXHIBIT "C"

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, DUBUQUE RACING ASSOCIATION, IOWA GREYHOUND ASSOCIATION, IOWA WEST RACING ASSOCIATION, Intervenors, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	EQUITY NO. 36601 AFFIDAVIT OF ANTHONY PAYNE

STATE OF IOWA)
) ss:
COUNTY OF POTTAWATTAMIE)

I, Anthony Payne, being first duly sworn, state under oath:

1. I have personal knowledge of the following facts and would so testify if called as a witness:

2. I am employed as Executive Director of the Iowa West Racing Association, an Iowa not-for-profit company with its principal place of business in Council Bluffs, Iowa, and which is the license-holder for Bluffs Run Racetrack and Casino ("Bluffs Run"). Bluffs Run operates a pari-mutuel racetrack and casino facility in Council Bluffs,

Iowa, licensed pursuant to Iowa Code Chapters 99D and 99F.

3. In 1993 Bluffs Run was on the verge of financial insolvency.

4. Without the revenues generated by the slot machines authorized by the 1994 Iowa Legislature and implemented at Bluffs Run in 1995, Bluffs Run would not have survived.

5. Although Bluffs Run's survival is dependent on its slot machine revenues, it has other legislative purposes, including educational, civic, charitable, tourism development, creation of jobs, creation of construction projects, and agriculture. Bluffs Run's agricultural purpose is to assist the development of the greyhound breeding industry.

6. From 1996 to the end of 2000 Bluffs Run will have subsidized the Iowa greyhound breeders from slot machine proceeds, exclusive of net operating losses, in an amount approximating $35 million. Further, during this same time period it is estimated that the operating losses from greyhound racing for Bluffs Run is at least an additional $10 million.

7. Without its slot machine revenues, Bluffs Run could not pay the above greyhound purses.

8. Pursuant to Iowa Code Section 99F.11, as amended by the Iowa Legislature in 1994, the adjusted gross receipts from gambling games generated at Bluffs Run have been taxed at the rate of 22% for the 1997 calendar year, 24% for the 1998 calendar year and 26% for the 1999 calendar year. For the 2000 calendar year, the adjusted gross receipts are being taxed at the rate of 28%,

which tax will increase by 2% for each succeeding calendar year thereafter until the rate reaches 36%. Iowa Code Section 99F.1(1) defines "adjusted gross receipts" of a licensee as the "gross receipts less winnings paid to wagerers."

9. Pursuant to Iowa Code Section 99F.11, the adjusted gross receipts from gambling games generated by Iowa riverboats were taxed for calendar years 1997-1999, at the fixed rate of 20%, and for calendar year 2000 and beyond, will continue to be taxed at the fixed rate of 20%.

10. (a) For the 1997 calendar year, Bluffs Run's adjusted gross receipts were $101,780,211 for which Bluffs Run paid a 22% wagering tax totaling $21,981,646, which was $1,975,604 more than Bluffs Run would have paid at 20% if it were a riverboat.

(b) For the 1998 calendar year, Bluffs Run's adjusted gross receipts were $108,539,933 for which Bluffs Run paid a 24% wagering tax totaling $25,579,584, which was $4,221,597 more than Bluffs Run would have paid at 20% if it were a riverboat.

(c) For the 1999 calendar year, Bluffs Run's adjusted gross receipts were $113,556,760 for which Bluffs Run paid a 26% wagering tax totaling $28,994,758, which was $6,633,406 more than Bluffs Run would have paid at 20% if it were a riverboat.

Accordingly, for calendar years 1997-1999, Bluffs Run has paid a total of $12,830,607 in wagering taxes more than it would have paid had its adjusted gross receipts been taxed at 20% as were such receipts for Iowa riverboats. This is in addition to the over $45 million paid to support greyhound racing at Bluffs Run.

11. For the calendar year, Bluffs Run's adjusted gross receipts through June 30, 2000 were $61,350,894 for which Bluffs Run had paid a 28% wagering tax of $16,588,250, which is $4,668,071 more than Bluffs Run would have paid at 20% if it were a riverboat.

12. If Bluffs Run's gross receipts for calendar years 2000-2004 remain the same as for estimated calendar year 2000 ($123,000,000), Bluffs Run will pay $72,000,000 more in wagering taxes for such years than if it were a riverboat taxed at 20%, to-wit:

Year	Estimated Adjusted Gross Receipts	Rate	Estimated Wagering Tax	Wagering Tax If Capped @ 20%	Difference
2000	$123,000,000	28%	$33,850,000	$24,250,000	$9,600,000
2001	"	30%	$36,250,000	"	$12,000,000
2002	"	32%	$38,650,000	"	$14,400,000
2003	"	34%	$41,050,000	"	$16,800,000
2004	"	36%	$43,450,000	"	$19,200,000
				TOTAL:	$72,000,000

13. As a non-profit corporation, and pursuant to Section 99F.6(4)(a) of the Iowa Code, Bluffs Run is required to distribute its profits for "educational, civic, public, charitable, patriotic, or religious uses as defined in Section 99B.7, subsection 3, paragraph 'b'". In accordance therewith, Bluffs Run donates all of its profits to the Iowa West Racing Association, which in turn donates its profits to the Iowa West Foundation. The Iowa West Foundation has made the following distributions to various charities since 1995.

1995 – $2,653,663
1996 – $7,184,827
1997 – $8,945,705

1998 – $10,380,144
1999 – $10,786,016
Spring 2000 – $5,110,215

Since 1995 Iowa West Foundation has given $45,060,570 to various educational, civic and charitable organizations for the betterment of the citizens and communities of southwestern Iowa. These counties include Monona, Crawford, Carroll, Harrison, Shelby, Audubon, Pottawattamie, Cass, Mills, Montgomery, Adams, Fremont, Page and Taylor. Iowa West Foundation has also given grants and gifts to the communities of Urbandale, Des Moines and Creston, Iowa.

14. Exhibits 1, 2 and 3 set forth a number of the charities, civic and educational organizations that the Iowa West Foundation has made charitable contributions to in the thirteen county area near Bluffs Run.

15. The gaming/entertainment industry is extremely competitive in Iowa and Bluffs Run competes for customers with the Iowa riverboats. The Iowa Legislature and the Iowa Racing and Gaming Commission have charged Bluffs Run with assisting various activities within the state such as civic, educational, and charitable organizations along with aiding tourism, creating jobs and providing new construction and assisting the Iowa greyhound industry. As evidenced above, Bluffs Run, through its grants, charitable contributions and purses for the Iowa greyhound breeders is attempting to be responsive to such charge. Bluffs Run loses money on its greyhound-related activities. For the calendar year ending June 30, 2000 losses from greyhound racing are in excess of $3 million. These losses will continue. Bluffs Run cannot pass onto its patrons the additional gaming taxes it is required to pay, the costs of the pari-mutuel operations and supplements,

and remain competitive with the riverboats. Thus, Bluffs Run is competitively disadvantaged by the disparate and escalating gaming tax.

16. Without the grants and charitable gifts many Iowa communities and charitable organizations would not have been able to improve their infrastuctures and/or provide needed services to their citizens or the people they aid.

/s/ A Payne
Anthony Payne

Dated this 27th day of July, 2000.

On this 27th day of July, 2000 before me, a Notary Public, personally appeared Anthony Payne, to me known to be the person named in and who executed the foregoing instrument, and acknowledged that Anthony Payne executed the same as his voluntary act and deed.

/s/ Debra M. Debbaut
Notary Public in the State of Iowa
expires
6/16/00

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, DUBUQUE RACING ASSOCIATION, IOWA GREYHOUND ASSOCIATION, IOWA WEST RACING ASSOCIATION, Intervenors, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	)	EQUITY NO. 36601 AFFIDAVIT OF VERNE WELCH

STATE OF IOWA)
) ss:
COUNTY OF POTTAWATTAMIE)

I, Verne Welch, being first duly sworn, state under oath:

1. I have personal knowledge of the following acts and would so testify if called as a witness.

2. I am employed as the Senior Vice President and General Manager of Bluffs Run which is an Iowa corporation with its principal place of business in Council Bluffs, Iowa. Bluffs Run operates a pari-mutuel racetrack and casino facility in Council Bluffs, licensed pursuant to Iowa Code Chapters 99D and 99F.

3. In 1993 Bluffs Run was on the verge of financial insolvency.

4. Without the revenues generated by the slot machines authorized by the 1994 Iowa Legislature and implemented at Bluffs Run in 1995, Bluffs Run would not have survived.

5. Although Bluffs Run's survival is dependent on its slot machine revenues, it has other legislative purposes, including educational, civic, charitable, development of tourism, creation of jobs, creation of new construction, and agriculture. Bluffs Run agricultural purpose is to assist the development of the greyhound breeding industry.

6. Harvey's presently owns the facilities of Bluffs Run. Harvey's purchased the facilities from the Iowa West Racing Association in 1999. Iowa West Racing Association is the license-holder for Bluffs Run and owns the slot machines.

7. Since its acquisition of the Bluffs Run facility, Harveys has spent millions of dollars in improvements and renovations. Included in these projects were improvements to the track surface, repair of kennels, improved lighting on the track, new carpet throughout the facility incorporating a greyhound design, construction of a winner's circle restaurant displaying photographs and information regarding winning greyhounds, new player tracking system and mutuel stations to improve wagering, and the ability to provide more simulcast greyhound racing from other venues. Bluffs Run's web site carries all programs, results and other information regarding greyhounds.

8. To further stimulate greyhound racing, Bluffs Run has created Seven Stakes races where the total purses are

approximately $1 million. The largest stakes purses in the country. Further Bluffs Run sponsors other races where the purses total $4.7 million year-to-date.

9. Bluffs Run spends approximately $1.5 million on advertising greyhound racing at its track. These expenditures include, but are not limited to, a new billboard dedicated exclusively to advertising greyhound racing, highway pylon advertising, marketing of simulcast Bluffs Run races to other venues.

10. As stated above, Bluffs Run is dependent upon the revenues it receives from the slot machines to remain financially viable. Presently, for the calendar year 2000 greyhound racing is operating at a loss of over $3.156 million. This loss is similar to the losses Bluffs Run has suffered in previous years related to greyhound racing.

11. The competition for customers is extremely competitive in the Council Bluffs/Omaha area. Not only must Bluffs Run compete with riverboats it must also compete for racing dollars with Horseman's Park in Omaha a simulcast horse racing facility.

12. The disparate treatment Bluffs Run receives as a result of the Iowa differential wagering tax vis-à-vis what the riverboats must pay makes it extremely difficult for Bluffs Run to compete for customers. In addition, Bluffs Run's ability to compete is further hampered by the lower tax levied against Horsemen's Park by the state of Nebraska. This tax ranges from 2.5% to 4%. Horsemen's Park broadcast simulcast racing and only has two days of live racing all year. As a result Iowa's differential tax rate hampers Bluffs Run's ability to compete.

13. The disparate treatment Bluffs Run receives as a result of the Iowa differential tax makes it difficult for Bluffs Run to expand and improve its facility which further hampers its ability to attract customers. Because of Bluffs Run inability to expand and provide the features of a large simulcast sporting facility has increasingly caused gambling dollars to go to Horseman's Park over the past several years. This amounts to several million dollars of lost revenue.

14. Bluffs Run must also supplement greyhound-racing purses by 7.25% of after tax slot revenues. This amounts to over $6.5 million dollars in 2000.

15. All of these factors make it difficult for Bluffs Run to compete with the riverboats, which do not face the disparate treatment of the Iowa, differential tax. This tax will continue to hamper Bluffs Run's ability to compete in the future, which in turn will have a negative impact upon the greyhound racing industry, and the suppliers of that industry. It will also adversely impact tourism in the Council Bluffs area.

16. As indicated Bluffs Run loses money on its greyhound-related activities. The riverboats are not required to support any industry. The riverboats' operating costs as a percentage to revenues are no greater than the racetracks' operating costs. Bluffs Run cannot pass on to its patrons the additional gaming taxes it is required to pay and remain competitive with the riverboats. Thus, Bluffs Run is competitively disadvantaged by the disparate and escalating gaming tax.

/s/ Verne Welch
Verne Welch

On this 27th day of July, 2000 before me, a Notary Public, personally appeared Verne Welch, to me known to be the person named in and who executed the foregoing instrument, and acknowledged that Verne Welch executed the same as his voluntary act and deed.

[SEAL]	RITA KEARNEY MY COMMISSION EXPIRES 8/24/2001

/s/ Rita Kearney
Notary Public in
the State of Iowa

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	EQUITY NO. 36601 AFFIDAVIT OF THOMAS L. FLYNN

STATE OF IOWA)
) ss:
COUNTY OF POLK)

I, Thomas L. Flynn, being first duly sworn on oath do depose and state that I am a licensed attorney in the general practice of law in Des Moines, Polk County, Iowa and represent the Racing Association of Central Iowa d/b/a Prairie Meadows Racetrack and Casino.

On or about April 19, 2000, I did request and receive from the Iowa Legislative Service Bureau (the "Bureau") a true and complete copy of the legislative history pertaining to House File 2179, which is attached hereto and certified by Diane E. Bolender, Director of the Bureau. Jonetta Douglas, an employee of the Bureau, advised me that House File 2179, as originally introduced, is on white paper; that proposed amendments to such bill by the Iowa House appear on yellow paper; that the bill as passed by the Iowa House appears on pink paper; that the bill as passed by the Iowa Senate appears on blue paper; and that the bill as enacted appears on white paper.

Dated this 31st day of July, 2000.

/s/ Thomas L. Flynn
Thomas L. Flynn

Subscribed and sworn to before me this 31st day of July, 2000.

/s/ Diana Gumm
Notary Public for the
State of Iowa

GENERAL ASSEMBLY OF IOWA

[LOGO]

LEGISLATIVE SERVICE BUREAU

STATE CAPITOL
DES MOINES, IOWA 50319
(515) 281-3566
FAX (515) 281-8027

April 19, 2000

[Names Omitted In Printing]

Mr. Thomas L. Flynn
Belin Lamson McCormick
Zumbach Flynn
2000 Financial Center
Des Moines, IA 50309

Dear Mr. Flynn:

As custodian of records retained by the Legislative Service Bureau, I certify that the enclosed documents relating to House File 2179 from the 1994 Session of the 75th General Assembly were compiled in accordance with the customary procedures of the Legislative Service

Bureau and represent true and accurate photostatic copies of documents filed in the General Assembly. The documents from which the photostatic copies were made are on file as public records in the Legislative Service Bureau. The complete official documents of enacted bills are in the custody of the Secretary of State.

Sincerely,

/s/ Diane E. Bolender
DIANE E. BOLENDER
Director

[Legislative History Omitted In Printing]

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	)	EQUITY NO. 36601 AFFIDAVIT OF TONY BISIGNANO

STATE OF IOWA)
) ss:
COUNTY OF POLK)

I, Tony Bisignano, depose and state:

1. I was a member of the Iowa Senate during the Seventy-Fifth General Assembly in both the 1993 and 1994 sessions. I represented Senate District 34, which is in Polk County. I was active in both sessions and between sessions in issues involving legislation relating to gambling in Iowa.

2. As of 1993, Iowa had in place the Iowa Pari-Mutuel Wagering Act (Iowa Code Chapter 99D), legalizing a system of wagering on the results of horse or dog races when conducted within a racetrack enclosure at a licensed horse-race or dog-race facility (hereinafter also referred to as "racetracks"). The only form of gambling allowed at racetracks or dog tracks was pari-mutuel wagering on horse races and dog races. The General Assembly by separate statute (Iowa Code Chapter 99F) had also established a

system of wagering on gambling games conducted on duly licensed excursion gambling boats (hereinafter also referred to as "riverboats"). At that time, the wagering tax on gambling games was in §99F.11, Iowa Code (1993), which provided in relevant part for a tax at a maximum rate of twenty percent on any amount of adjusted gross receipts over $3 million. The statute governing excursion boat gambling also provided that licensees only allow a maximum wager of $5.00 per hand or play and a maximum loss of $200.00 per person during each gambling excursion.

3. During the 1993 legislative session, the Racing Association of Central Iowa (RACI), licensee of the Prairie Meadows Racetrack facility, was in bankruptcy. RACI was cutting back on racing days in an effort to reduce its losses. The dog tracks in Council Bluffs, Waterloo and Dubuque were also experiencing financial difficulties. At the same time, riverboat licensees were being threatened by competition from other states, particularly Illinois, which allowed excursion gambling without the stringent limits imposed by Iowa. One riverboat had moved its operations from Iowa in order to relocate in a state without such limits. As a countermeasure, racetrack licensees sought legislation in the 1993 session to legalize gambling games at their racetrack facilities, and the riverboat licensees sought legislation to increase the limits on losses. Neither group was successful in persuading the General Assembly to enact legislation providing relief for their concerns during the 1993 session.

4. In the interim period before the commencement of the 1994 session, representatives of the racetrack and riverboat interests, together with legislators from the affected areas, met in an effort to reach a consensus on

mutually satisfactory legislation that would alleviate the economic problems both groups were having. Meetings were held over the summer in various locations with members and representatives of both groups, including legislators, participating in the discussions. As a State Senator from Polk County, I participated in those meetings.

5. This coalition reached a consensus agreement prior to the commencement of the 1994 session of the General Assembly. The agreement was that the coalition would support legislation legalizing gambling games (except table games) at racetrack enclosures (but only to those licensed on January 1, 1994) and elimination of the loss limits on riverboats. It was further agreed that all racetrack licensees should use the receipts from gambling games to supplement purses for races, particularly for Iowa-bred horses and greyhounds, and that Prairie Meadows should use its receipts from gambling games, after payment of operating expenses, taxes and fees, to first pay its unpaid debts from its pari-mutuel operations. The essential terms of the agreement were incorporated in an amendment introduced by twelve (12) members of the Iowa House (H-5333) to House File 2179 as filed by the Committee on State Government. As originally filed, H-5333 did not provide a differential relating to the taxation of adjusted gross receipts from gambling games. In fact, as originally filed, H-5333 simply incorporated the tax rates applicable to gambling games at riverboats and made them applicable to gambling games at racetrack enclosures. H-5333, in proposed section 99F.4A(6), provided that "[t]he adjusted gross receipts received from gambling games shall be taxed at the same rates and the proceeds distributed in the same manner as provided in section

99F.11." Thus, the adjusted gross receipts from gambling games were to be taxed equally at racetracks and riverboats.

6. The Speaker of the Iowa House, Harold Van Maanen, a gambling opponent, made it clear that he would allow House consideration and voting on House File 2179 only once, rather than allow additional consideration of the bill if it returned in a different form from the Iowa Senate. Because of that restriction, I and the other legislative proponents of the legislation sought to have the bill come out of the House in a form that would accomplish the coalition's objectives and be acceptable to the bill's proponents in the Senate.

7. During the course of House debate on House File 2179, Rep. Steve Hansen from Woodbury County, the site of a riverboat, filed an amendment (H-5391) that introduced a differential in the tax rates imposed on gambling games on riverboats and gambling games at racetracks. This was contrary to the agreement of the coalition and the legislators who had worked with the coalition in reaching the agreement represented by H-5333. His amendment to Iowa Code 99F.11(1) retained the maximum twenty percent rate of tax on adjusted gross receipts over $3 million on gambling games on riverboats. The amendment, however, taxed the adjusted gross receipts from gambling games at racetracks at the rate of forty percent on any amount over $3 million. The amendment was passed by the House on March 17, 1994.

8. When I and other proponents of H-5333 learned of this amendment, I spoke with Rep. Hansen. He indicated that he was willing to have his amendment reconsidered and defeated but would then offer a new amendment

providing for a two-year moratorium before the tax increase in racetrack gaming took effect in order to give racetrack supporters a change to repeal the tax disparity in the next General Assembly. Subsequently, on the same date, Rep. Hansen filed a motion to reconsider H-5391, which motion was passed, and on reconsideration, H-5391 lost. Rep. Hansen then filed a new amendment from the floor. The new amendment provided that beginning January 1, 1997, the rate on any amount of adjusted gross receipts over $3 million from gambling rates at racetrack enclosures would be twenty-two percent and would increase by two percent each succeeding calendar year until the rate was thirty-six percent. This amendment passed and was part of the bill when it passed the House on March 17, 1994. The amendment was also part of the bill when it subsequently passed the Senate, without being returned to the House, and when it became law upon the signature of the Governor.

/s/ Tony Bisignano
Tony Bisignano

Dated this 24th day of July, 2000.

SUBSCRIBED AND SWORN to before me this 24th day of July, 2000.

/s/ Diana Gumm
NOTARY PUBLIC,
In and For the State of Iowa

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	)	EQUITY NO. 36601 AFFIDAVIT OF MATT MCCOY

STATE OF IOWA)
) ss:
COUNTY OF POLK)

I, Matt McCoy, depose and state:

1. I was a member of the Iowa House during the Seventy-Fifth General Assembly in both the 1993 and 1994 sessions. I represented House District 67, which is in Polk County. I was active in both sessions and between sessions in issues involving legislation relating to gambling in Iowa.

2. As of 1993, Iowa had in place the Iowa Pari-Mutuel Wagering Act (Iowa Code Chapter 99D), legalizing a system of wagering on the results of horse or dog races when conducted within a racetrack enclosure at a licensed horse-race or dog-race facility (hereinafter also referred to as "racetracks"). The only form of gambling allowed at racetracks or dog tracks was pari-mutuel wagering on horse races and dog races. The General Assembly by separate statute (Iowa Code Chapter 99F) had also established a

system of wagering on gambling games conducted on duly licensed excursion gambling boats (hereinafter also referred to as "riverboats"). At that time, the wagering tax on gambling games was in § 99F.11, Iowa Code (1993), which provided in relevant part for a tax at a maximum rate of twenty per cent on any amount of adjusted gross receipts over $3 million. The statute governing excursion boat gambling also provided that licensees only allow a maximum wager of $5.00 per hand or play and a maximum loss of $200.00 per person during each gambling excursion.

3. During the 1993 legislative session, the Racing Association of Central Iowa (RACI), licensee of the Prairie Meadows Racetrack facility, was in bankruptcy. RACI was cutting back on racing days in an effort to reduce its losses. The dog tracks in Council Bluffs, Waterloo and Dubuque were also experiencing financial difficulties. At the same time, riverboat licensees were being threatened by competition from other states, particularly Illinois, which allowed excursion gambling without the stringent limits imposed by Iowa. One riverboat had moved its operations from Iowa in order to relocate in a state without such limits. As a countermeasure, racetrack licensees sought legislation in the 1993 session to legalize gambling games at their racetrack facilities, and the riverboat licensees sought legislation to increase the limits on losses. Neither group was successful in persuading the General Assembly to enact legislation providing relief for their concerns during the 1993 session.

4. In the interim period before the commencement of the 1994 session, representatives of the racetrack and riverboat interests, together with legislators from the affected areas, met in an effort to reach a consensus on

mutually satisfactory legislation that would alleviate the economic problems both groups were having. Meetings were held over the summer in various locations with members and representatives of both groups, including legislators, participating in the discussions. As a State Representative from Polk County, I participated in those meetings.

5. This coalition reached a consensus agreement prior to the commencement of the 1994 session of the General Assembly. The agreement was that the coalition would support legislation legalizing gambling games (except table games) at racetrack enclosures (but only to those licensed on January 1, 1994) and elimination of the loss limits on riverboats. It was further agreed that all racetrack licensees should use the receipts from gambling games to supplement purses for races, particularly for Iowa-bred horses and greyhounds, and that Prairie Meadows should use its receipts from gambling games, after payment of operating expenses, taxes and fees, to first pay its unpaid debts from its pari-mutuel operations. The essential terms of the agreement were incorporated in an amendment introduced by twelve (12) members of the Iowa House (H-5333) to House File 2179 as filed by the Committee on State Government. I was one of the twelve sponsors of H-5333. As originally filed, H-5333 did not provide a differential relating to the taxation of adjusted gross receipts from gambling games. In fact, as originally filed, H-5333 simply incorporated the tax rates applicable to gambling games at riverboats and made them applicable to gambling games at racetrack enclosures. H-5333, in proposed section 99F.4A(6), provided that "[t]he adjusted gross receipts received from gambling games shall be taxed at the same rates and the proceeds distributed in

the same manner as provided in section 99F.11." Thus, the adjusted gross receipts from gambling games were to be taxed equally at racetracks and riverboats.

6. The Speaker of the Iowa House, Harold Van Maanen, a gambling opponent, made it clear that he would allow House consideration and voting on House File 2179 only once, rather than allow additional consideration of the bill if it returned in a different form from the Iowa Senate. Because of that restriction, I and the other legislative proponents of the legislation sought to have the bill come out of the House in a form that would accomplish the coalition's objectives and be acceptable to the bill's proponents in the Senate.

7. During the course of House debate on House File 2179, Rep. Steve Hansen from Woodbury County, the site of a riverboat, filed an amendment (H-5391) that introduced a differential in the tax rates imposed on gambling games on riverboats and gambling games at racetracks. This was contrary to the agreement of the coalition and the legislators who had worked with the coalition in reaching the agreement represented by H-5333. His amendment to Iowa Code 99F.11(1) retained the maximum twenty percent rate of tax on adjusted gross receipts over $3 million on gambling games on riverboats. The amendment, however taxed the adjusted gross receipts from gambling games at racetracks at the rate of forty percent on any amount over $3 million. No reasons were offered by Rep. Hansen or any other House Representatives for taxing racetracks at a higher rate than riverboats. The amendment was passed by the House on March 17, 1994.

8. When I and other proponents of H-5333 learned of this amendment, I spoke with Rep. Hansen. He indicated that he was willing to have his amendment reconsidered and defeated but would then offer a new amendment providing for a two-year moratorium before the tax increase in racetrack gaming took effect in order to give racetrack supporters a change to repeal the tax disparity in the next General Assembly. Subsequently, on the same date, Rep. Hansen filed a motion to reconsider H-5391, which motion was passed, and on reconsideration, H-5391 lost. Rep. Hansen then filed a new amendment from the floor. The new amendment provided that beginning January 1, 1997, the rate on any amount of adjusted gross receipts over $3 million from gambling rates at racetrack enclosures would be twenty-two percent and would increase by two percent each succeeding calendar year until the rate was thirty-six percent. This amendment passed and was part of the bill when it passed the House on March 17, 1994. The amendment was also part of the bill when it subsequently passed the Senate, without being returned to the House, and when it became law upon the signature of the Governor.

/s/ Matt McCoy
Matt McCoy

Dated this 21st day of July, 2000.

SUBSCRIBED AND SWORN to before me this 21 day of July, 2000.

/s/ Diana Gumm
NOTARY PUBLIC,
In and For the State of Iowa

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, DUBUQUE RACING ASSOCIATION, LTD., IOWA GREYHOUND ASSOCIATION, IOWA WEST RACING ASSOCIATION, Intervenors, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	)	EQUITY NO. 36601 AFFIDAVIT OF BRENT SIEGRIST

STATE OF IOWA	)	
	)	SS:
COUNTY OF POTTAWATTAMIE	)	

I, Brent Siegrist, being first duly sworn, state under oath:

1. I was a member of the Iowa House during the Seventy-Fifth General Assembly in both in 1993 and 1994 sessions. I represented House District 84, which is in Pottawattamie County. I was active in both sessions in issues involving legislation relating to gambling in Iowa. At that time, as a member of the Republican Party, I

served as Majority Leader and I am presently Speaker of the House.

2. As of 1993, Iowa had in place the Iowa Pari-Mutuel wagering Act (Iowa Code Chapter 99D), legalizing a system of wagering on the results of horse or dog races when conducted within a racetrack enclosure at a licensed horse-race or dog-race facility (hereinafter also referred to as "racetracks"). The only form of gambling allowed at racetracks or dog tracks was pari-mutuel wagering on horse races and dog races which also included simulcast wagering at these tracks. The General Assembly by separate statute (Iowa Code Chapter 99F) had also established a system of wagering on gambling games conduced on duly licensed excursion gambling boats (hereinafter also referred to as "riverboats"). At that time, the wagering tax on gambling games was in section 99F.11, Iowa Code (1993), which provided in relevant part for a tax at a maximum rate of twenty percent on any amount of adjusted gross receipts over $3 million. The statute governing excursion boat gambling also provided that licensees only allow a maximum wager of $5.00 per hand or play and a maximum loss of $200.00 per person during each gambling excursion.

3. During the 1993 legislative session, the Racing Association of Central Iowa (RACI), licensee of the Prairie Meadows Racetrack facility, was in bankruptcy. RACI was cutting back on racing days in an effort to reduce losses. The dog tracks in Council Bluffs, (Bluffs Run), Waterloo and Dubuque were also experiencing financial difficulties. At the same time, riverboat licensees were threatened by competition from other states, particularly Illinois, which allowed excursion gambling without the stringent limits imposed, by Iowa. One riverboat had moved its operations

from Iowa in order to relocate in a state without such limits. As a countermeasure, racetrack licensees sought legislation in the 1993 session to legalize gambling games at their racetrack facilities, and the riverboat licensees sought legislation to increase the limits on losses. Neither group was successful in persuading the General Assembly to enact legislation providing relief for their concerns during the 1993 session.

4. In the interim period before the commencement of the 1994 session, representatives of the racetrack and riverboat interests, together with legislators from the affected areas, met in an effort to reach a consensus on mutually satisfactory legislation that would alleviate the economic problems both groups were having. Meetings were held over the summer in various locations with members and representatives of both groups, including legislators, participating in the discussions. As a State Representative from Pottawattamie County, I participated in those meetings.

5. This coalition reached a consensus agreement prior to the commencement of the 1994 session of the General Assembly. The agreement was that the coalition would support legislation legalizing gambling games (except table games) at racetrack enclosures (but only to those licensed on January 1, 1994) and elimination of the loss limits on riverboats. It was further agreed that all racetrack licensees should use some of the receipts from gambling games to supplement purses for races, particularly for Iowa-bred horses and greyhounds. The essential terms of the agreement were incorporated in an amendment introduced by twelve (12) members of the Iowa House (H-5333) to House File 2179 as filed by the Committee on State Government. As originally filed, H-5333 did

not provide a differential relating to the taxation of adjusted gross receipts from gambling games. In fact, as originally filed, H-5333 simply incorporated the tax rates applicable to gambling games at riverboats and made them applicable to gambling games at racetrack enclosures. H-5333, in proposed section 99F.4A(6) provided that "[t]he adjusted gross receipts received from gambling games shall be taxed at the same rates and the proceeds distributed in the same manner as provided in section 99F.11." Thus, the adjusted gross receipts from gambling games were to be taxed equally at racetracks and riverboats.

6. The Speaker of the Iowa House, Harold Van Maanen, a gambling opponent, made it clear that he would allow House consideration and voting on House File 2179 only once, rather than allow additional consideration of the bill if it returned in a different form from the Iowa Senate. Because of that restriction, the proponents of the legislation sought to have the bill come out of the House in a form that would accomplish the coalition's objectives and be acceptable to the bill's proponents in the Senate.

7. During the course of House debate on House File 2179, Rep. Steve Hansen from Woodbury County, the site of a riverboat filed an amendment (H-5391) that introduced a differential in the tax rates imposed on gambling games on riverboats and gambling games at racetracks. This was contrary to the agreement of the coalition and the legislators who had worked with the coalition in reaching the agreement represented by H-5333. His amendment to Iowa Code section 99F.11(1) retained the maximum twenty percent rate of tax on adjusted gross receipts over $3 million on gambling games on riverboats. The amendment, however, taxed the adjusted gross

receipts from gambling games at racetracks at the rate of forty percent on any amount over $3 million. No reasons were offered by Rep. Hansen or any other House Representative for taxing racetracks at a higher rate than riverboats. The Hose passed the amendment on March 17, 1994.

8. When I and other proponents of H-5333 learned of this amendment, Rep. Hansen was approached. He indicated that he was willing to have his amendment reconsidered and defeated but would then offer a new amendment providing for a two-year moratorium before the tax increase in racetrack gaming took effect in order to give racetrack supporters a chance to repeal the tax disparity in the next General Assembly. Subsequently, on the same date, Rep. Hansen filed a motion to reconsider H-5391, which motion passed, and on reconsideration, H-5391 lost. Rep. Hansen then filed a new amendment from the floor. The new amendment provided that beginning January 1, 1997, the rate on any amount of adjusted gross receipts over $3 million from gambling rates at racetrack enclosures would be twenty-two percent and would increase by two percent each succeeding calendar year until the rate was thirty-six percent. This amendment passed and was part of the bill when it passed the House on March 17, 1994. The amendment was also part of the bill when it subsequently passed the Senate, without being returned to the House, and when it became law upon the signature of the Governor.

/s/ Brent Siegrist
Brent Siegrist

Dated this 27th day of July, 2000.

On this 27th day of July, 2000 before me, a Notary Public, personally appeared Brent Siegrist, to me known to be the person named in and who executed the foregoing instrument, and acknowledged that Brent Siegrist executed the same as his voluntary act and deed.

/s/ Debra M. Debbout
Notary Public in the
State of Iowa Expires 6/16/00

IN THE IOWA DISTRICT COURT FOR
POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, DUBUQUE RACING ASSOCIATION, IOWA GREYHOUND ASSOCIATION, IOWA WEST RACING ASSOCIATION, Intervenors, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	EQUITY NO. 36601 AFFIDAVIT OF MICHAEL GRONSTAL

STATE OF IOWA)
) SS:
COUNTY OF POTTAWATTAMIE)

I, Michael Gronstal, being first duly sworn, state under oath:

1. I was a member of the Iowa Senate during the Seventy-Fifth General Assembly in both the 1993 and 1994 sessions. I am a Democrat and represented Senate district 42, which is in Pottawattamie County. I was active in both sessions in issues involving legislation relating to gambling in Iowa.

2. As of 1993, Iowa had in place the Iowa Pari-Mutuel Wagering Act (Iowa Code Chapter 99D), legalizing a system of wagering on the results of horse or dog races when conducted within a racetrack enclosure at a licensed horse-race or dog-race facility (hereinafter also referred to as "racetracks"). The only form of gambling allowed at racetracks or dog tracks was pari-mutuel wagering on horse races and dog races which included simulcast wagering at these tracks. The General Assembly by separate statute (Iowa Code Chapter 99F) had also established a system of wagering on gambling games conducted on duly licensed excursion gambling boats (hereinafter also referred to as "riverboats"). At that time, the wagering tax on gambling games was in section 99F.11, Iowa Code (1993), which provided in relevant part for a tax at a maximum rate of twenty percent on any amount of adjusted gross receipts over $3 tax at a maximum rate of twenty percent on any amount of adjusted gross receipts over $3 million. The statute governing excursion boat gambling also provided that licensees only allow a maximum wager of $5.00 per hand or play and a maximum loss of $200.00 per person during each gambling excursion.

3. During the 1993 legislative session, the Racing Association of Central Iowa (RACI), licensee of the Prairie Meadows Racetrack facility, was in bankruptcy. RACI was cutting back on racing days in an effort to reduce losses. The dog tracks in Council Bluffs (Bluffs Run), Waterloo and Dubuque were also experiencing financial difficulties. At the same time, riverboat licensees were threatened by competition from other states, particularly Illinois, which allowed excursion gambling without the stringent limits imposed, by Iowa. One riverboat had moved its operations from Iowa in order to relocate in a state without such

limits. As a countermeasure, racetrack licensees sought legislation in the 1993 session to legalize gambling games at their racetrack facilities, and the riverboat licensees sought legislation to increase the limits on losses. Neither group was successful in persuading the General Assembly to enact legislation providing relief for their concerns during the 1993 session.

4. In the interim period before the commencement of the 1994 session, representatives of the racetrack and riverboat interests, together with legislators from the affected areas, met in an effort to reach a consensus on mutually satisfactory legislation that would alleviate the economic problems both groups were having. Meetings were held over the summer in various locations with members and representatives of both groups, including legislators, participating in the discussions. As a State Senator from Pottawattamie County, I participated in those meetings.

5. This coalition reached a consensus agreement prior to the commencement of the 1994 session of the General Assembly. The agreement was that the coalition would support legislation legalizing gambling games (except table games) at racetrack enclosures (but only to those licensed on January 1, 1994) and elimination of the loss limits on riverboats. It was further agreed that all racetrack licensees should use some of the receipts from gambling games to supplement purses for races, particularly for Iowa-bred horses and greyhounds. The essential terms of the agreement were incorporated in an amendment introduced by twelve (12) members of the Iowa House (H-5333) to House File 2179 as filed by the Committee on State Government. As originally filed, H-5333 did not provide a differential relating to the taxation of

adjusted gross receipts from gambling games. In fact, as originally filed, H-5333 simply incorporated the tax rates applicable to gambling games at riverboats and made them applicable to gambling games at racetrack enclosures. H-5333, in proposed section 99F.4A(6), provided that "[t]he adjusted gross receipts received from gambling games shall be taxed at the same rates and the proceeds distributed in the same manner as provided in section 99F.11." Thus, the adjusted gross receipts from gambling games were to be taxed equally at racetracks and riverboats.

6. In 1994 during debate on House File 2179 I was the State Government Committee Chair and floor managed the bill in the Senate.

7. The Speaker of the Iowa House, Harold Van Maanen, a gambling opponent, made it clear that he would allow House consideration and voting on House File 2179 only once, rather than allow additional consideration of the bill if it returned in a different form from the Iowa Senate. Because of that restriction, the proponents of the legislation sought to have the bill come out of the House in a form that would accomplish the coalition's objectives and be acceptable to the bill's proponents in the Senate. I had the votes in the Senate to strike the escalating tax but we decided that rather than risk losing the whole bill we decided to pass it in the form approved by the House.

8. During the course of House debate on House File 2179, Rep. Steve Hansen from Woodbury County, the site of a riverboat, filed an amendment (H-5391) that introduced a differential in the tax rates imposed on gambling games on riverboats and gambling games at racetracks. This was contrary to the agreement of the coalition and

the legislators who had worked with the coalition in reaching the agreement represented by H-5333. His amendment to Iowa Code section 99F.11(1) retained the maximum twenty percent rate of tax on adjusted gross receipts over $3 million on gambling games on riverboats. The amendment, however, taxed the adjusted gross receipts from gambling games at racetracks at the rate of forty percent on any amount over $3 million. No reasons were offered by Rep. Hansen or any other House Representative for taxing racetracks at a higher rate than riverboats. The House passed the amendment on March 17, 1994.

9. When I and other proponents of H-5333 learned of this amendment, Rep. Hansen was approached. He indicated that he was willing to have his amendment reconsidered and defeated but would then offer a new amendment providing for a two-year moratorium before the tax increase in racetrack gaming took effect in order to give racetrack supporters a chance to repeal the tax disparity in the next General Assembly. Subsequently, on the same date Rep. Hansen filed a motion to reconsider H-5391, which motion passed, and on reconsideration, H-5391 lost. Rep. Hansen then filed a new amendment from the floor. The new amendment provided that beginning January 1, 1997, the rate on any amount of adjusted gross receipts over $3 million from gambling rates at racetrack enclosures would be twenty-two percent and would increase by two percent each succeeding calendar year until the rate was thirty-six percent. This amendment passed and was part of the bill when it passed the House on March 17, 1994. The amendment was also part of the bill when it subsequently passed the Senate, without being

returned to the House, and when it became law upon the signature of the Governor.

/s/ Michael Gronstal
Michael Gronstal

Dated this 27th day of July, 2000.

On this 27th day of July, 2000 before me, a Notary Public, personally appeared Michael Gronstal, to me known to be the person named in and who executed the foregoing instrument, and acknowledged that Michael Gronstal executed the same as his voluntary act and deed.

/s/ Debra M. Debbout
Notary Public in the
State of Iowa Expires 6/16/03

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	EQUITY NO. 36601 AFFIDAVIT OF MARY KRAMER

STATE OF IOWA)
) ss:
COUNTY OF POLK)

I, Mary Kramer, depose and state:

1. I was a member of the Iowa Senate during the Seventy-Fifth General Assembly in both the 1993 and 1994 sessions. I represented Senate District 37, which is in Polk County. I was active in both sessions in issues involving legislation relating to gambling in Iowa. I am presently President of the Iowa Senate.

2. In August, 1993, I was appointed by Governor Terry Branstad to serve on a bipartisan working group ("Gaming Study Committee") to conduct a study of Iowa's gaming laws, which Gaming Study Committee was co-chaired by Edward Stanek and Lorraine May.

3. As a member of the Gaming Study Committee, I reviewed substantial information furnished by various

sources and attended two meetings. Among other things, the Gaming Study Committee gave consideration to the following factors:

a. Chapters 99D, 99E and 99F of the Iowa Code were enacted to promote economic development, increase jobs, generate tax revenue and support riverfront development.

b. The bet and loss limits under which the Iowa riverboats were then operating placed them at a disadvantage to riverboats from Illinois.

c. The Iowa racetracks were having serious financial problems and faced closure, which would be detrimental to the agricultural industries dependent on them.

4. Among other things, and in an effort to enhance revenues and the ability to compete, the Gaming Study Committee recommended that the bet and loss limits on Iowa riverboats be eliminated and that slot machines be allowed in the Iowa racetracks. In its recommendation, the Gaming Study Committee, at pages 35-36 thereof, stated that because the racetracks "could function with a lower operating cost," the state should receive a gaming tax of up to 24% of adjusted gross revenues over three million dollars received from the slot machines. I am not aware of, or ever recall seeing, any financial information which supported the statement that racetracks "could function with a lower operating cost" and have no personal knowledge one way or the other concerning this statement.

5. I am not aware of any reasons ever given in the Iowa Senate in conjunction with the passage of House File 2179 as to why Iowa racetracks should have their adjusted gross receipts taxed at 36% and Iowa riverboats have their

adjusted gross receipts taxed at only 20%. The Gaming Study Committee never discussed or contemplated a gaming tax disparity of this degree.

/s/ Mary Kramer
Mary Kramer

Dated this 28 day of July, 2000.

SUBSCRIBED AND SWORN to before me this 28 day of July, 2000.

/s/ [Illegible]
NOTARY PUBLIC,
In and For the State of Iowa

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

RACING ASSOCIATION OF CENTRAL IOWA, Plaintiff, v. MICHAEL FITZGERALD, TREASURER, STATE OF IOWA, Defendant.	EQUITY NO. 36601 DECLARATION OF EUGENE CHRISTIANSEN

I, Eugene Christiansen, declare the following:

1. I am the Chairman of Christiansen Capital Advisors. I have nearly 25 years of experience in the gaming industry as an executive and a consultant. I have personally authored numerous studies on the economics, taxation, financial structure and regulation of gaming. Attached is a copy of my curriculum vitae.

2. I am familiar with the tax imposed by Iowa Code § 99F.11 on the adjusted gross receipts from gambling games at race tracks. This tax is unique. In other states in the nation which allow slot machines and/or video lottery terminals, they are taxed and/or revenue shared by the state for the most part at the same rate regardless of where the device is located. For example, this is true in Montana, Nevada, Oregon, South Carolina, and South Dakota which currently allow slot machines in different kinds of enterprises. [Montana R.S. 23-5-612(1), Nevada R.S. 463.370, Oregon R.S. 461.547, South Carolina R.S. § 12-22-510(A), South Dakota R.S. 42-7A-63.))

3. Louisiana, the only other state besides Iowa that authorizes slot machines both on excursion gambling boats and at racetracks, has a slightly lower tax rate (18 percent vs. 18.5 percent) for slot machines at racetracks.

4. No other state has established a tax rate that is 80 percent higher (36 vs. 20 percent) depending on the location of the device.

5. Only one state (Illinois) has an adjusted gross receipts tax on any form of gaming revenues that approaches 36 percent. Illinois recently enacted an adjusted gross receipts of 35 percent on annual riverboat gaming revenues in excess of $100,000,000. 230 ILCS 10. Significantly, the 35 percent tax level only applies to revenues in excess of $100,000,000. It is my belief that only riverboats in the Chicago area will have adjusted gross receipts at this level. There is a riverboat that is being moved from the Mississippi River to Rosemont (suburban Chicago). Pursuant to the same Illinois legislation, that riverboat will have to pay 15 percent of adjusted gross receipts into a special state fund to support horse racing

6. Furthermore, spinning-reel only slot machines at racetracks in Iowa may be at a competitive disadvantage to riverboats (that are allowed to operate a full-complement of slot machines including video devices, and limited table gaming). From previous Christiansen Capital Advisors studies of the experience with gaming devices at pari-mutuels or neighborhood retail businesses, we conclude that these variables bear materially on how these devices perform. Moreover, from these previous studies, Christiansen Capital Advisors is able to draw some important conclusions regarding the use of these machines:

- Video poker, while an attractive product, is not as attractive as the slot (reel) machine. Further, actual spinning reels appear to be more popular than video facsimiles of spinning reels.
- However, the public prefers a broad spectrum of machines, including video facsimiles of other games of chance, to only one kind of machine (as at Iowa racetracks). Restrictions on the types of machines allowed at pari-mutuels have been shown to limit potential revenues.

I certify under penalty of perjury and pursuant to the laws of Iowa that the preceding is true and correct.

August 7, 2000 — Date

/s/ Eugene Christiansen — Eugene Christiansen

Eugene M. Christiansen

Mr. Christiansen has been active as an executive and consultant to the commercial gambling and entertainment industries since 1976. In the area of commercial gambling, he has conducted studies of the economics, taxation, financial structure, and regulation of casino gaming, pari-mutuel wagering, and lotteries, and has counseled Manhattan and Washington, D.C. law firms in legal proceedings where gambling was an issue.

Representative work includes studies of the efficiency of a U.S. state lottery; estimates of the demand for casino gaming, lotteries, and pari-mutuel wagering in U.S. and foreign markets; the feasibility and revenue potential of

off-track betting; the financial structure of the Atlantic City casino industry; the impact of gambling on U.S. Indian reservation lands on state-authorized gambling industries; analyses of gambling taxation; procedures to increase wagering and improve the efficiency of parimutuel betting operations; the changing nature of communications media and the implications of the changes for horse racing; the interrelationships among evolving consumer expectations, casino gaming, and other forms of entertainment; the evaluation of a proposed cable television network for a major U.S. telecommunications company; and assessment of acquisition prospects for a major equity fund.

Mr. Christiansen is the author of numerous articles dealing with casinos, horse racing, greyhound racing, jai alai, off-track betting, lotteries and related activities in trade, professional, and academic publications. He prepares authoritative statistical reports that are widely used domestically and abroad, including annual analyses of the gross wager of the United States which appear in *International Gaming and Wagering Business* magazine and other trade publications. These are recognized throughout the world as the most comprehensive and authoritative description of the gambling industries of the U.S. He is also a co-author of an influential academic study of gambling, *The Business of Risk: Commercial Gambling in Mainstream America* (University Press of Kansas, 1985).

Mr. Christiansen is a member of the advisory boards of the National Council on Problem Gambling and the Institute for the Study of Gambling and Commercial Gaming at the University of Nevada, Reno. He has also served on the faculty of that University's Executive Development Program.

Mr. Christiansen has accepted numerous invitations to address conferences concerned with casinos, the racing industry, real estate, the International Bar Association, and the Washington Journalism Center. He has also testified on various aspects of commercial gambling before Congress and state and local governments. His comments regarding gambling matters are often sought by the news media.

Mr. Christiansen is a graduate of the University of California at Berkeley.

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(1)

Supreme Court, U.S.
FILED

MAR 3 2003

CLERK

No. 02-695

In The
Supreme Court of the United States

MICHAEL FITZGERALD, Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD. and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF FOR THE PETITIONER

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HBK

QUESTION PRESENTED

May the State of Iowa, without violating the Equal Protection Clause, tax the revenue from slot machines at racetracks at different rates than the revenue from all casino games, including slot machines, on riverboats?

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OPINION BELOW

The opinion of the Iowa Supreme Court is reported at *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 648 N.W.2d 555 (Iowa 2002).

JURISDICTION

The decision of the Iowa Supreme Court was issued on June 12, 2002, and amended on September 6, 2002. A petition for rehearing was denied on August 6, 2002.

A petition for a writ of certiorari was filed on November 4, 2002, and granted on January 17, 2003.

Jurisdiction rests on 28 U.S.C. § 1257(a). There is no adequate and independent state law ground for the lower court decision. This Court will refuse to decide cases that rest on an adequate and independent state law ground due to "[r]espect for the independence of state courts" and the need to avoid "rendering advisory opinions." *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). If state courts choose to rely on federal precedent in analyzing parallel state and federal constitutional provisions, so that the decision appears "to rest primarily on federal law, or to be interwoven with the federal law," this Court should accept jurisdiction in the absence of a "plain statement" that the federal precedent provides only guidance and does not compel the result. *Id.*

The Iowa Supreme Court did not make a "plain statement" to distinguish between the state and federal constitutional provisions in this case. Before it analyzed the tax statute at issue under the state and federal Equal Protection Clauses, the Court paused to "briefly address

the significance of invoking both the state and federal constitutions." (Cert. Pet. App. 6). After quoting the relevant text from each constitution, the Court observed that "Iowa courts are to 'apply the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim.'" The Court indiscriminately cited both state and federal cases before it ultimately concluded that "the tax violates the state and federal equal protection clauses." (Cert. Pet. App. 16). At no time did the Court draw any distinction between the two constitutions. The state law determination was wholly dependent on and inseverable from the Court's understanding of the federal Equal Protection Clause.

The legal tradition in Iowa Courts is clear and well-established that the same analysis is used to resolve constitutional issues raised under the Equal Protection Clauses of the state constitution as is used to resolve such issues under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002) ("We usually deem the federal and state equal protection clauses to be identical in scope, import, and purpose. We therefore apply the same analysis in considering state equal protection claims as we do in considering federal equal protection claims under the Fourteenth Amendment to the Federal Constitution."); *Krull v. Thermogas Co.*, 522 N.W.2d 607, 614 (Iowa 1994) ("In equal protection challenges based on the federal and Iowa Constitutions, we usually interpret both federal and state equal protection provisions the same."); *Rudolph v. Iowa Methodist Medical Ctr.*, 293 N.W.2d 550, 557 (Iowa 1980) ("We apply the same test under the federal and state constitutions."). Indeed, in the very rare circumstances under which the Iowa Supreme

Court has construed the state Equal Protection Clause differently from its federal counterpart, the Court took explicit steps to explain clearly its unusual departure from federal precedent. *See Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980). The Court took no explicit steps that suggest a departure from federal precedent.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Iowa Constitution, art. I, § 6.

All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

Iowa Code § 99F.11(1).

A tax is imposed on the adjusted gross receipts received annually from gambling games authorized by the chapter at a rate of five percent on the first one million

dollars of adjusted gross receipts, at a rate of ten percent on the next two million dollars of adjusted gross receipts, and at a rate of twenty percent on any amount of adjusted gross receipts over three million dollars. However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetracks is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is thirty-six percent. The taxes imposed by this section shall be paid by the licensee to the treasurer of the state within ten days after the close of the day when the wagers were made and shall be distributed as follows. . . .

STATEMENT OF THE CASE

In this action three racetracks and an association of dog owners challenge the constitutionality of a state tax statute which taxes the revenue from slot machines at racetracks at different rates than the revenue from casino games on riverboats. From 1989 until 1994 casino games, including slot machines, were authorized only on riverboats along the Missouri River and Mississippi River. From the outset, riverboats paid a wagering tax on adjusted gross revenue of five percent on the first million dollars, 10 percent on the next two million dollars and 20 percent on any amount over three million dollars.[1] *See* 1989 Iowa Acts, ch. 67, § 11.

[1] Adjusted gross revenue is the gross receipts less the amount paid out to gamblers. Iowa Code § 99F.1(1) (2001). The Iowa Racing and

(Continued on following page)

In 1994 the Iowa Legislature expanded gambling by authorizing slot machines at racetracks. The racetracks and the riverboats paid the same wagering tax on adjusted gross revenue up to three million dollars. But the Iowa Legislature phased in an escalating tax on adjusted gross revenue in excess of three million dollars from slot machines at racetracks. Beginning in 1997 the tax increased to 22 percent and increased by two percent each succeeding calendar year until the tax reached a top rate of 36 percent. Iowa Code § 99F.11(1) (2001).

Because the escalating tax rate applied to revenue from slot machines at racetracks but not to revenue from casino games on riverboats, a coalition of racetracks and dog owners claimed the tax structure violates the Equal Protection Clauses of the state and federal constitutions. The Respondents are subject to the escalating tax rate on adjusted gross revenues at racetracks or have an interest in racetrack purses that are affected by the escalating tax rates. The Racing Association of Central Iowa operates the racetrack for horses, Prairie Meadows Racetrack and Casino, in Altoona, Iowa. (Cert. Pet. App. 48-49). Dubuque Racing Association, Ltd., and Iowa West Racing Association operate racetracks for dogs in Dubuque and Council Bluffs, respectively. (J.A. 9, 13-14). The Iowa Greyhound Association is an organization of greyhound owners who race animals at the Dubuque and the Council Bluffs

Gaming Commission determines the amount paid out to gamblers. Iowa Code § 99F.4(15) (2001). By rule, the Commission has set a range from 80 percent to 100 percent of the amount wagered. 491 Iowa Admin. Code 11.9(2). The exact amount of the payout is determined by standard methods of probability theory.

racetracks. (J.A. 23-24). In order to put this litigation in context, it is necessary to review the history of the racetracks and the riverboats in Iowa in light of the legislative efforts to rescue these industries from financial difficulties.

A. Wagering at Horse and Dog Tracks

Racetracks and riverboats are distinct businesses authorized under separate statutory frameworks for different purposes. In 1983 Iowa opened the door to gambling by permitting wagering at horse and dog tracks. 1983 Iowa Acts, ch. 187. At that time, betting on horse and dog races was the only gambling permitted at racetracks. (J.A. 24, 26, 28).

By 1989, four racetracks were operating in Iowa: Prairie Meadows, a horse track, in Altoona; Dubuque Greyhound Park, a dog track, in Dubuque; Bluffs Run, a dog track, in Council Bluffs.; and Waterloo Greyhound Park, a dog track, in Waterloo. From 1990 to 1993, all three dog tracks suffered a decrease in annual revenue of more than 50 percent ranging from a low 57 percent decrease at Waterloo to a high 89 percent decrease at Dubuque. (J.A. 37-38). Prairie Meadows, the only horse track in Iowa, experienced similar declines in revenue shortly after it opened in 1989. By 1991 Prairie Meadows filed for chapter 11 bankruptcy. (J.A. 29). Two years later, in 1993, the Waterloo Greyhound Park also filed for chapter 11 bankruptcy. (J.A. 31).

B. Casino Gambling on Riverboats

In 1989, six years after permitting wagering at racetracks, Iowa authorized casino gambling on riverboats. (J.A. 28). To attract economic development to river towns by drawing on Iowa's riverboat heritage, the Iowa Legislature allowed riverboats to offer traditional forms of casino-style gambling in addition to slot machines, including craps, roulette, blackjack, red dog, baccarat, poker and keno. (J.A. 25). The riverboats have been the catalyst for needed economic development in river communities along the historic Mississippi River and the Missouri River which form the eastern and western borders of Iowa.

By 1994, the riverboats also faced economic difficulties. The Iowa riverboats competed for patrons with riverboats licensed in other States. But Iowa imposed strict wager limits of $5.00 per bet and loss limits of $200.00 per person on each riverboat "excursion" which other States did not impose. Iowa Code § 99F.9(2) (1993). In less than one year, Iowa lost three of six riverboats to states with more favorable gambling laws. From July, 1992, to March, 1993, the Diamond Lady, the Emerald Lady and the Dubuque Casino Belle ceased operations in Iowa and transferred into other gaming jurisdictions. (J.A. 30-31, 52, 74).

C. Legislative Reaction to Economically Troubled Industries

In 1994, prompted by the recommendations of a Gaming Task Force appointed by the Governor the previous year to study the two troubled gaming industries, the Iowa Legislature took steps to deal with the distinct economic problems facing racetracks and riverboats. First,

the Legislature eliminated the wager and loss limits on riverboats making them more competitive with neighboring States. 1994 Iowa Acts, ch. 1021, §§ 13, 19. Second, the Legislature authorized slot machines at racetracks as an additional source of revenue. Iowa Code § 99F.4A (2001). At the same time the Legislature adopted a tax rate applicable to adjusted gross revenue from slot machines at racetracks that started at 20 percent for revenue in excess of three million dollars, the same rate applicable to revenue from casino games on riverboats, but escalated the rate applicable to racetracks by two percent each succeeding calendar year until the tax rate reached 36 percent in 2004. 1994 Iowa Acts, ch. 1021, § 25. All three statutes were enacted in one bill; however, the escalating tax rate applicable to racetracks is the only statute challenged in this case.

D. Financial Bonanza for Racetracks

The addition of slot machines at the racetracks dramatically increased the revenue at each racetrack facility. By 1999 slot machines were producing approximately 5 billion dollars in annual revenue at Prairie Meadows, Bluffs Run and Dubuque Greyhound Park. (Rec. State's Exhibit 8, p. 2).

At the time summary judgment motions in this case were submitted to the Iowa district court, the racetrack at Prairie Meadows estimated annual adjusted gross revenues of nearly $150,000,000 from slot machines. The tax rate of 36 percent would have left Prairie Meadows with approximately $100,000,000. (J.A. 120-122). Despite the escalating tax rate, the money left after taxes was sufficient for Prairie Meadows to plan capital improvements

between 1998 through 2006 and to increase purses for horse owners through 2002. (J.A. 113-116).

Slot machines similarly brought increased revenues to Bluffs Run. The dog track projected annual adjusted gross receipts of nearly $123,000,000 from slot machines. (J.A. 141). Application of the 36 percent tax rate would have left a pool of money amounting to approximately $80,000,000. (J.A. 141).

Dubuque Greyhound Park and Casino also showed increased revenue from slot machines. Although the Dubuque racetrack claimed it may be forced to close, it did not attribute this possibility solely to the escalating tax rate. The racetrack cited market maturity and losses in greyhound operations as factors. (J.A. 134). In any event, the Dubuque Racing Association holds the licenses to operate *both* Dubuque Greyhound Park and Casino and the Greater Dubuque Riverboat Entertainment Company. (J.A. 129, 131). A decision to close the racetrack would avoid the escalating tax rate and very likely redirect slot machine patrons from the racetrack to the riverboat – operated by the same nonprofit corporation.

E. Proceedings in the Iowa Courts

The district court dismissed this action in its entirety on December 4, 2000, pursuant to the State's motion for summary judgment. (Cert. Pet. App. 40). The district court identified three conceivable rational bases for the differential tax rates: the legislature wanted to promote development of river communities; the legislature wanted to promote Iowa's riverboat heritage; and the legislature

deemed riverboat casinos to be a useful industry. (Cert. Pet. App. 34).

The Iowa Supreme Court, in a narrow 4-3 decision, reversed the district court and declared the tax rates unconstitutional under the Equal Protection Clause. (Cert. Pet. App. 15-16). The Iowa Supreme Court decided that the sole purpose behind the three statutes enacted in 1994 was "to save the tracks from economic distress" and that a tax structure which distinguishes between revenue from slot machines at racetracks and revenue from casino games on riverboats is irrational.

The three dissenting justices recognized a number of rational bases for taxing the revenue from casino games on riverboats at a lower tax rate:

> Riverboats are not the same as racetracks. From an entertainment perspective, they speak to different cultural traditions – river lore versus agriculture ... [T]here is no constitutional impediment to a legislature favoring diversity in cultural attractions for its citizens and tourists. And, rightly or wrongly, a legislative majority could rationally determine that a riverboat casino holds more romantic tourist appeal than a casino stuck in a dog track.
>
> To advance these policy decisions, a reasonable legislature would also want to recognize a very pragmatic distinction between the two gambling venues: riverboats are mobile, racetracks are not. If the economic climate turns unfavorable here, a riverboat merely unties its lines and sails elsewhere. So it is not unreasonable for the legislature to create economic incentives to develop or retain riverboat gambling while maintaining the status quo with respect to other forms of the sport.

(Cert. Pet. App. 18-19).

F. Impact of the Iowa Supreme Court Decision

The Iowa Supreme Court held the escalating tax rate on adjusted gross revenue from slot machines at racetracks to be unconstitutional as a violation of the Equal Protection Clause and thereby reduced the tax rate applicable to revenue from slot machines at racetracks to a maximum of 20 percent on any amount over three million dollars – a rate exactly equal to the tax rate applicable to adjusted gross revenue from casino games on riverboats.

A constitutional mandate that the State tax the revenue from slot machines at racetracks and from casino games on riverboats at an equal rate could spark a flood of litigation over state and federal tax statutes. Any legislative policy that has been implemented through a tax preference could be vulnerable to attack.

If the Iowa Supreme Court decision stands, Iowa may be forced to refund to the racetracks all taxes on adjusted gross revenue from slot machines collected in excess of 20 percent dating back to 1997. This amount totals more than 100 million dollars. (J.A. 122, 136, 141).

SUMMARY OF ARGUMENT

Rational speculation under the Equal Protection Clause of the Fourteenth Amendment should neither unduly restrict elected state officials who must craft solutions to the tough economic problems that face state

governments nor unreasonably burden the court systems that must consider challenges under the Equal Protection Clause. The Equal Protection Clause allows state legislatures to draw distinctions in tax classifications that, in absence of jeopardy to fundamental rights or creation of categories based on inherently suspect characteristics, need only further a legitimate state interest. Legislatures may make factual assumptions and base tax classifications upon them. These factual assumptions and the relationship of the tax classifications to a legitimate state interest should be upheld unless wholly irrational.

Under this framework, the Iowa Legislature should have been able to relieve the economic problems of the gambling industry without violating the Equal Protection Clause. Two financially troubled businesses – riverboats and racetracks – needed help. In 1994 the Iowa Legislature enacted statutes to assist each business in a different way. To help the riverboats, the Legislature dropped the strict wager and loss limits to make the riverboats more competitive with those licensed in other States. To help the racetracks, the Iowa Legislature took a bold step to authorize racetracks to operate slot machines, a step which no other State had taken at that point in time. Whether the Iowa Legislature could tax this new source of revenue at racetracks at different rates than the revenue from casino games on riverboats should have turned on rational speculation by the Iowa Supreme Court. That is, could the Iowa Legislature prefer riverboats under *any reasonable conceivable set of facts*?

But the Iowa Supreme Court took a detour on the road to rational speculation. The Court rejected legitimate state interests that support a preference for riverboats in drawing tax classifications. The district court had posited

three reasons for the tax classifications that would have met constitutional standards: promoting development of river communities; or promoting riverboat history; or promoting riverboat casinos as a useful industry. (Cert. Pet. App. 34). A tax preference for riverboats might also be supported by a legitimate state interest in preventing riverboats from leaving Iowa; or compensating riverboats for high operating expenses; or protecting the expectations of existing riverboat owners; or attracting new riverboats. By rejecting the legitimate state interests identified by the district court and declining to engage in "rational speculation" to search for any legitimate state interest on its own initiative, the Iowa Supreme Court fell short of its analytic obligation.

In lieu of rational speculation, the Iowa Supreme Court pursued a fact finding mission and substituted its own judgment for that of the Iowa Legislature. The Court erroneously relied on financial data to assess the impact of the escalating tax rates on the racetracks. Concluding that the escalating tax rates "will seriously jeopardize the racetracks' viability," the Court issued the remarkable directive that the Legislature must "tax racetracks and riverboats equally at a rate they both can bear." (Cert. Pet. App. 14).

In this startling application of the Equal Protection Clause, the Iowa Supreme Court substituted its own judgment for the legislative policy decision to structure tax rates to prefer riverboats over racetracks. The Iowa Supreme Court decision marks a profound change in the analytic framework applicable to tax challenges that radically alters the relationship between elected officials and the court system. This decision would limit the legislative prerogative to solve economic problems by substituting fact

finding missions for rational speculation. Tax policy choices would move into courtrooms and overwhelm the already overburdened state and federal court systems with misguided searches for facts sufficient to justify tax classifications under the Equal Protection Clause. Unless balance is restored in this case, an intrusive review of legislative tax policy could dramatically shift the power to solve economic problems away from elected officials and into the courtroom.

The Iowa Supreme Court's construction of the Equal Protection Clause is unsupported by legal precedent and is an unwise intrusion into legislative tax policy that should be reversed.

ARGUMENT

THE STATE OF IOWA DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BY TAXING REVENUE FROM SLOT MACHINES AT RACETRACKS AT DIFFERENT RATES THAN IT TAXES REVENUE FROM ALL CASINO GAMES (INCLUDING SLOT MACHINES) ON RIVERBOATS.

Setting the tax rate for adjusted gross revenue from gambling games, the Iowa Legislature distinguished between two classes of taxpayers: riverboat licenses and racetrack licensees. The analytic framework for applying the Equal Protection Clause to these classifications of taxpayers is neither novel nor complex. The United States Constitution prohibits the States from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This language "does not forbid classifications. It simply keeps government

decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). A statute must be upheld if there is any reasonable conceivable factual basis to support it. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Generally, the Equal Protection Clause requires only a "plausible policy reason for the classification, [that] the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and [that] the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. at 11 (citations omitted).

These standards have been applied to tax classifications with particular deference. As early as 1890 this Court declared the Fourteenth Amendment "was not intended to compel the states to an iron rule of equal taxation." *Bell's Gap R. Co. v. Commonwealth*, 134 U.S. 232, 235 (1890). *See also Magoun v. Illinois Trust & Savs. Bank*, 170 U.S. 283, 294 (1898) ("There is therefore no precise application of reasonableness of classification, and the rule of equality permits many practical inequalities.") Nearly forty years later, this Court declared that "inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitations." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937). "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). More recent cases have defined a narrow role of judicial review for legislative choices in taxation. *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 359-61 (1973). The power to tax is a sovereign power reserved

to the States which ensures the States' fiscal systems and economic vitality. *Id.* at 357 (citing to *Allied Stores v. Bowers*, 358 U.S. 522, 526-27 (1959)).

Application of the correct analytic framework to the tax classifications in this case should have sustained the constitutionality of the state statute.

A. Differences in Tax Rates Imposed by States Are Subject to Rational Basis Review and Must be Upheld if Supported by Any Conceivable Rational Basis for the Tax Structure.

The Iowa Supreme Court failed to accord the Iowa Legislature the appropriate deference in formulating the tax classifications. State "legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Nordlinger v. Hahn*, 505 U.S. at 10 (quoting from *McGowan v. Maryland*, 366 U.S. 420, 425-46 (1961)). When establishing classifications for taxation, "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Williams v. Vermont*, 472 U.S. 14, 22 (1985) (quoting from *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. at 359)). *See also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983).

The analytic framework for the equal protection analysis did not require the Iowa Supreme Court to evaluate the merits of the legislative policy underlying the tax classifications. Indeed, such an evaluation exceeds the Court's authority. A court considering whether rational bases support a statute is not compelled to verify the legislative decision with statistical evidence. *Hughes v.*

Alexandria Scrap Corp., 426 U.S. 794, 812 (1976). A Court may find a rational basis for an enactment even when the facts relative to that basis are disputed or their "effect opposed by argument and opinion of serious strength." *Rast v. Van Deman & Lewis Comp.*, 240 U.S. 342, 357 (1916). Due to the strong presumption of validity that attaches to legislative tax determinations, the Constitution gives great latitude to legislative factual and policy judgments. *See FCC v. Beach Communications, Inc.*, 508 U.S. at 307, 313-14, 320 ("[T]he assumptions underlying [the legislature's] rationales may be erroneous, but the very fact that they are arguable is sufficient, on rational-basis review, to immunize the congressional choice from constitutional challenge"). "[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. at 10.

The Iowa Supreme Court failed to apply rational basis review to the differential tax structure at issue in this case. Rather than engage in rational speculation about legitimate state interests that could support tax classifications that express a preference for riverboats, the Iowa Supreme Court scrutinized the legislative decision itself. The Court assessed the worsening financial condition of the racetracks before the arrival of slot machines. Next, the Court assessed impact of the escalating tax rates on the new slot machine revenue from the racetracks. Then, second-guessing the legislative decision to authorize slot machines at financially distressed racetracks yet impose a higher tax rate on racetracks than on riverboats, the Court

concluded the tax classifications were irrational. (Cert. Pet. App. 13-14, 16).

The Court took up consideration of state interests in support of the tax classifications only after concluding that the tax classifications were irrational. Viewed in this analytic sequence, it is unsurprising that the Court rejected all of the state interests that were urged in support of the tax classifications. (Cert. Pet. App. 14-15). Addressing the legislative tax preference for riverboats, the Court said flatly: "we are not persuaded that our state riverboat history can only be promoted through such favoritism as taxing racetracks at an eighty percent higher rate than riverboats. The State can make riverboats more competitive with other states without penalizing racetracks through a thirty-six percent tax on gross receipts." (Cert. Pet. App. 15). Ultimately, the Court mandated absolute equality in taxation. (Cert. Pet. App. 17). This judicial oversight of legislative policy is squarely at odds with rational speculation.

If the Equal Protection Clause is applied to facilitate judicial intrusion into the legislative process, decision making on tax policy will shift away from state legislatures into the courtrooms. Unless rational speculation is applied by courts to search for "plausible policy reasons" for tax classifications, judicial intrusion could threaten tax classifications designed to carry out social policy. Tax credits, for example, are often offered by States to further social policies, including, economic development, employment and expansion of state facilities. "Today every state provides tax incentives as an inducement to local industrial location and expansion." Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 Minn. L. Rev. 413, 431 (1997). State and federal tax incentives have been

enacted to promote growth and development in distressed areas. *See, e.g.*, 42 U.S.C. § 11501 (authorizing Enterprise Zone Development); 42 U.S.C. § 5308 (authorizing community development through loan guarantees), 42 U.S.C. § 198 (Brownfields tax incentives to promote environmental clean-up). To the extent that these tax statutes extend tax credits to persons in distressed areas, but not to persons engaged in similar activities in non-distressed areas, the Iowa Supreme Court decision threatens to unravel the tax differentials.

A return to rational speculation would accord legislatures the appropriate leeway to draw tax classifications which in their judgment produce reasonable systems of taxation.

B. Racetracks and Riverboats Are Not Similarly Situated Businesses.

Under rational speculation, the equal protection analysis should have ended at the threshold question whether the state statute treats differently classes of taxpayers who are "in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. at 10. If the taxpayers are not similarly situated, a difference in treatment cannot violate the Equal Protection Clause. *See Parham v. Hughes*, 441 U.S. 347, 354-56 (1979). Because the tax applies to revenue from slot machines both at racetracks and on riverboats, the Iowa Supreme Court concluded the two businesses are "alike in all relevant respects." (Cert. App. 7-9).

The Court's perspective focuses on the ultimate source of revenue rather than the taxpayers. Courts should focus on whether the taxpayers are similarly situated, not

whether the taxpayers pay taxes on similar sources of revenue. *See, e.g., General Motors Corp. v. Tracy*, 519 U.S. 278, 285, 311-12 (1997) (natural gas purchasers taxed differently based on source of supply); *Nordlinger v. Hahn*, 505 U.S. at 16-17 (property owners taxed differently based on recency of real estate transactions); *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 463-65 (1988) (parents taxed differently for transportation of school children based on status of school district).

Beyond obvious cultural, recreational and economic differences,[2] the facilities are authorized to conduct different forms of gaming. Riverboats may be licensed to conduct "gambling games." Iowa Code § 99F.7(1) (2001). The Iowa Racing and Gaming Commission has the authority to decide which gambling games are permitted on the riverboat casinos. Iowa Code §§ 99F.1(9), 99F.7(1) (2001). The Commission, in turn, has promulgated rules approving craps, roulette, blackjack, red dog, baccarat, poker, slot machines, and video poker. 491 Iowa Admin. Code 11.5. Racetracks, by contrast, are limited to slot machines. Iowa Code § 99F.1(9) (2001). (J.A. 24-25). Even if riverboats have opted to use most of their casino space for slot machines, (Cert. Pet. App. 8), the scope of authorized gaming is fundamentally broader and gaming could shift from slot

[2] The two businesses serve very different purposes. Racetracks promote the agricultural economy by assisting the horse and dog industries; riverboats promote economic development by drawing the tourist industry to old river cities along Iowa's borders. Justice Neuman, in her dissent from the Iowa Supreme Court's majority opinion, aptly described this difference: "[f]rom an entertainment perspective, they speak to different cultural traditions – river lore versus agriculture." (Cert. Pet. App. 18).

machines to other casino games at the discretion of the riverboat owners with the approval of the Commission.

A proper focus on the nature of the businesses should have led the Iowa Supreme Court to conclude that the two classes of taxpayers are not similarly situated.

C. Iowa's Escalating Tax Rates on Revenue From Slot Machines at Racetracks Rationally Further Numerous Legitimate State Interests.

The Iowa Supreme Court overlooked numerous legitimate state interests which support the tax classifications. Certainly, the Equal Protection Clause "does not demand for the purpose of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. at 15. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Allied Stores v. Bowers*, 358 U.S. 522, 528 (1959). Rather, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. at 313.

The state interest underlying a tax classification is rarely codified into law. When the state interest is codified, consideration by the courts of "any reasonably conceivable state of facts" may be cut short. In *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989), for example, the West Virginia Constitution expressly required all real property to be "taxed at a rate uniform throughout the State according to its estimated market value." *Id.* at 345. The state interest in tax assessments

had been expressly written into the constitution and, therefore, any classifications in relation to assessments had to be consistent with this articulated purpose. When the county assessor valued taxable property based solely on its recent purchase price, property recently sold was necessarily taxed at a much higher rate than property that had not been sold in decades. Because this practice created "gross disparities in the assessed value of generally comparable property," *id.* at 338, the classifications of taxpayers created by the assessor's practices could not be held to rationally further the state interest expressly spelled out in the state constitution. *Id.* at 338, 344-45.

The statute in issue in this case does not indicate the purpose for which the Iowa Legislature drew the challenged tax classifications. In the absence of such codification of the purpose of a law, courts may look to state interests for a law articulated by legal counsel defending the classification or to state interests for the law found by lower courts, or may itself identify another possible state interest that would justify the law. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 463 (1988) ("[W]e are not bound by explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us 'that the legislative facts . . . could not reasonably be conceived to be true by the governmental decisionmaker.'") (quoting from *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). No empirical support is necessary to sustain such a classification. *Vance v. Bradley*, 440 U.S. at 110.

Consistent with a strong presumption of constitutionality and the judicial deference due tax classifications, this Court has invalidated state tax laws in rare circumstances when statutes confer tax benefits on a wholly arbitrary

basis, *see, e.g., Williams v. Vermont*, 472 U.S. 14, 23-24 (1985), or the tax classifications do not further any legitimate state interest, *see, e.g., Hooper v. Bernalillo*, 472 U.S. 612, 618-22 (1985). But it is clear that a State may use tax policy to foster a particular type of business. "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one . . . or to restrict or suppress the other. . . ." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. at 512.

The Iowa Supreme Court should have considered all of the "plausible policy reasons" relied upon by the Iowa district court and should have engaged in rational speculation on its own to search for any conceivable rational basis for the tax classification which imposed a lower tax rate on gaming revenue from riverboats than from racetracks.

The Iowa district court used rational speculation to find three legitimate state interests for taxing the gaming revenue from riverboats at a lower rate than the gaming revenue from racetracks:

- *Promoting development of river communities.*
- *Promoting riverboat history.*
- *Promoting riverboat casinos as a useful industry.* (Cert. Petition App. 34).

The Iowa Legislature could have looked to any of these interests to impose a lower tax rate on gaming revenue from riverboats, and thereby limit "the burden of the tax in order to foster what it conceives to be a beneficent enterprise." *See Carmichael v. Southern Coal & Coke Co.*, 301 U.S. at 512. As determined by the district court, the Iowa Legislature could have seen the riverboats industry as more important to the State than racetracks, thus

justifying a more favorable tax rate. Or the legislature may have seen the economic development of riverfronts on Iowa's rivertowns as more important than providing a windfall to the racetracks. *See City of Fort Madison, Iowa v. Emerald Lady*, 990 F.2d 1086, 1087 (8th Cir. 1993) ("Several years ago, in a bid to attract tourists and stimulate local economies, Iowa legalized riverboat gambling."). Or the legislature may have seen the promotion of historic riverboats as a greater tool than racetracks for economic development, tourism, or marketing. Any of these reasons is sufficient to satisfy the equal protection test. *See FCC v. Beach Communications, Inc.*, 508 U.S. at 317. Drawing tax classifications is clearly a legislative judgment. As Justice Neuman stated in her dissent: "[R]ightly or wrongly, a legislative majority could rationally determine that a riverboat casino holds more romantic tourist appeal than a casino stuck in a dog track." (Cert. Pet. App. 18).

Additional conceivable rational bases supporting the classifications created by the Iowa Legislature could include the following:

• *Preventing more riverboats from leaving Iowa*. The legislature could have reasonably retained the 20 percent maximum tax rate on adjusted gross revenue from casinos games on riverboats in order to prevent more riverboats from leaving the State. By 1994 the promising early experiment with riverboat gambling was quickly turning into a failure. Three of the original six riverboat casinos left Iowa to operate in other states with more favorable gambling laws. (J.A. 30, 52, 74). By maintaining the 20 percent maximum tax rate on adjusted gross revenue from slot machines on riverboats, Iowa remained competitive with the tax rates in other states that allowed riverboat

gambling. *See* Ill. Rev. Stat. Ch. 120, ¶ 2413 (1991) (20 percent rate); Mo. Rev. Stat. § 313.822 (1993) (20 percent rate).

• *Compensating riverboats for high operating expenses*. The legislature may have reasonably assumed that the tax on adjusted gross revenue from gambling games on riverboats should be limited to 20 percent, because the riverboats have operating expenses that land-based operations do not. Unlike other States, Iowa does not allow riverboats to remain permanently docked to land. Iowa's riverboats must satisfy yearly "cruising" requirements established by the Iowa Racing and Gaming Commission. Iowa Code § 99F.7(1) (2001); 491 IAC 5.6(2). Further, riverboats in Iowa are required to be designed to replicate the design of riverboats from Iowa history. Iowa Code § 99F.7(3) (2001). The riverboats are also subject to an additional layer of extensive regulations due to the operation on navigable water regulated by the federal government. (*See* City of Bettendorf Amicus Brief in Support of Petition for Writ of Certiorari, p. 8, n. 2).

• *Protecting the expectations of existing riverboat owners*. The legislature may have rationally assumed a need to protect the vested expectations of the businesses who had established riverboats in Iowa. The riverboats established prior to 1994 faced a top tax rate of 20 percent on adjusted gross revenue in excess of three million dollars. The vested expectation of taxpayers is a legitimate state interest when drawing tax classifications. *Nordlinger v. Hahn*, 505 U.S. at 12-13 (considering the vested expectations of existing landowners); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 178 (considering the expectations of long-time pensioners). Protecting vested expectations may be particularly important when setting

tax rates for a business that is mobile and can feasibly relocate to another jurisdiction.

• *Attracting new riverboats to Iowa*. The legislature may have rationally assumed a lower tax rate could draw new riverboats to Iowa. New riverboats encourage development of local industries that service the riverboats, i.e., barges, hull inspection services, marine supplies and repair, and dock construction and improvement. The increased tourist traffic, in turn, encourages development of hotels and restaurants. In addition, the riverboats themselves provide a market for Iowa products, because the riverboats must sell arts, crafts, and gifts that are native to and made in Iowa. Iowa Code § 99F.7(5) (2001).

Had the Iowa Supreme Court properly considered "plausible policy reasons" for the tax classifications, analysis of the rational relationship between the tax classifications and the legislative goal would have become evident. Surely a lower tax rate on gaming revenue from riverboats furthers a legitimate state interest in promoting development of river communities; or promoting riverboat history; or promoting riverboat casinos as a useful industry; or any of the legitimate state interests set forth above. (Cert. Pet. App. 34).

D. The Iowa Supreme Court Misconstrued the Equal Protection Doctrine and Improperly Substituted Its Own Policy Judgment for That of the Iowa Legislature.

Rejecting the district court's "plausible policy reasons" for the tax classifications and declining to engage itself in "rational speculation," a narrow majority of the Iowa

Supreme Court shifted focus to the legislative purpose underlying a separate statute not in issue in this case. (Cert. Pet. App. 4). Addressing the legislative purpose for authorizing slot machines at the racetracks, the Court observed:

> Overriding this entire issue is the fact that the 1994 legislation was designed to save the racetracks and riverboats from financial distress. . . . The primary reason the legislature authorized racetracks to operate slots was to provide them with increased revenue. Without revenue from the slot machines, the Racetracks' future was in question.

(Cert. Pet. App. 10-11). Once the Court headed down this path, the escalating tax rate appeared to be at odds with the legislative purpose of saving the racetracks from financial distress. (Cert. Pet. App. 11). How, the Court wondered, could a tax classification that weighs more heavily on the racetracks further the State's interest in saving the racetracks from economic distress? (Cert. Pet. App. 13-14).

1. The 1994 Legislation Served Multiple Purposes.

Because the Iowa Supreme Court improperly treated the three separate and distinct statutes enacted in 1994 as a single enactment with a single purpose, the Court ignored several legitimate state interests that support the tax classifications in issue. Although the legislature did authorize slot machines "to save the racetracks," the legislation authorizing slot machines at racetracks is not the legislation challenged in this case. Section 99F.4A, enacted in 1994, allowed the racetracks to make application

for gambling licenses. Iowa Code § 99F.4A (2001) ("Upon application, the commission shall license the licensee of a pari-mutuel dog or horse racetrack to operate gambling games at a pari-mutuel racetrack enclosure. . . ."). The legislative purpose of this statute is distinct from the legislative purposes in creating two tax classifications for the adjusted gross revenue from slot machines at racetracks and on riverboats.

Legislators may have a number of different reasons for enacting a statute, and it is not possible for the Courts to "record a complete catalogue of the considerations that move [legislative] members to [act]." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. at 510. Because a legislature need not articulate reasons for enacting a statute, *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179, the absence of legislative facts explaining the distinction between classifications "on the record" has no significance in a rational basis case. *FCC v. Beach Communications, Inc.*, 508 U.S. at 315. A single bill encompassing several different and entirely separate statutory provisions could have "multiple and somewhat inconsistent purposes" that are the product of compromises made by individual legislators during the bill-making process. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 181 (Stevens, J., concurring).

In its effort to ascertain the one "true" legislative intent, the Iowa Supreme Court placed undue significance on the presumed motive of an individual legislator. The Court noted the proposal for an escalating tax on the revenue from slot machines at racetracks originated from a legislator representing a riverboat district. (Cert. Pet. App. 4). It is improper under federal and state law to derive the legislative purpose of a statute from the words

of a single legislator. *See Bread Political Action Committee v. Fed. Election Comm'n*, 455 U.S. 577, 581 n.3 (1982) (no weight accorded to affidavits of a senator); *Donnelly v. City of Des Moines*, 403 N.W.2d 768, 771 (Iowa 1987) ("[W]e will not consider a legislator's own interpretation of the language or purpose of a statute. . . . "); *Ruthven Consol. Sch. Dist. v. Emmetsburg Cmty. Sch. Dist.*, 382 N.W.2d 136, 140 (Iowa 1986) ("In common with most states we will not consider a legislator's private interpretation of a statute, even if the legislator was actively involved in drafting and enacting the legislation."). Because statutes are enacted by a legislature acting as a whole, the motive of an individual legislator is not imputed to the legislative body.

2. The Iowa Supreme Court Improperly Used Fact Finding Instead of Rational Speculation.

Deviating from the rational basis test, the Iowa Supreme Court improperly engaged in its own fact finding in an effort to *disprove* any rational relationship between the differential tax rates and the single purpose the Court posited for enactment of the statute. In doing so, the Court ignored alternative purposes the Iowa Legislature might have had as a basis for the differential tax rate and any reasonable beliefs the Iowa Legislature might have had as a basis on which it predicated the differential tax rates. Because of the strong presumption of validity attached to a tax statute, a reviewing court may not through its own independent fact finding substitute its view of the relevant facts for any factual basis reasonably assumed to exist by the legislature.

The Court relied on the amount of revenue generated by slot machines from racetracks in proportion to revenue

generated from other sources and the amount of tax that the racetracks are expected to pay in future years as a limitation on the amount of charitable distributions. (Cert. Pet. App. 8-13). These fact findings are used by the Court to buoy a flawed conclusion: the state's only legitimate purpose in enacting the tax statute was to save the racetracks from financial distress, and the escalating tax on gaming revenue from racetracks "is contrary to" and "frustrates" this legislative purpose.[3] (Cert Pet. App. 11, 13).

[3] The Iowa Supreme Court's factual observations were not only improper but simply incorrect. The scant evidence in the record on this issue is sufficient to show that the two major tracks are thriving – and would continue to thrive under a 36 percent tax on adjusted gross revenue. When motions for summary judgment were submitted to the district court, Prairie Meadows estimated annual adjusted gross receipts of $149,453,670 for future years. At the highest tax rate of 36 percent, the tax would be $53,093,321. (J.A. 122). Prairie Meadows would then retain $96,360,321 for operating expenses and public purpose expenditures which include subsidizing horse racing, contributing to county government and making other charitable contributions. Similarly, the figures at Bluffs Run show adjusted gross receipts of $123,000,000 and taxes at 36 percent of $48,170,000 which leaves a pool of $74,830,000 in money for operating expenses and public purpose expenditures. (J.A. 136). The racetracks have sufficient funds under the applicable tax rates to expend significant amounts at the track facilities and to attract interested buyers. Prairie Meadows planned to spend money for improvements – $6 million from 1998 to 2002 and $14 million from 2003 through 2006, even though the tax rate would have peaked in 2004. Spending $20 million for improvements at the facility, with no need to borrow, is the sign of a thriving enterprise. Further, Prairie Meadows planned to increase purses to horse owners from $10,312,251 in 1998 to $16,595,606 in 2002, even as the racetrack approached the top tax rate. (J.A. 114). Meanwhile, Bluffs Run was sold in 1999 to Harveys', a sophisticated company well familiar with the gaming business and fully aware that the tax rate would progress in the future to 36 percent. (J.A. 145).

This Court has summarily reversed a state supreme court for such a factual foray into the record. In *Central State Univ. v. American Ass'n of University Professors*, 526 U.S. 124 (1999) (per curiam), the Ohio Supreme Court, like the Iowa Supreme Court in this case, had erroneously looked to evidence in the record to determine whether a statute was supported by a rational basis. *Id.* at 126-127. This Court held the fact that there is a lack of evidence in the record to establish a rational basis "does not detract from the rationality of legislative decision." *Id.* at 128.

A court should not decide whether facts assumed by the legislature were accurate on the basis of independent judicial determinations but rather only whether facts assumed by the legislature were wholly irrational or unreasonable. When considering the constitutionality of a tax statute, courts should consider all conceivable rational purposes and the reasonableness, not the correctness, of any factual assumptions that the legislature may have made when it enacted the statute. If independent judicial determinations were allowed to substitute for rational basis review, equal protection challenges would turn into fact finding missions. Issues that should be decided on the basis of motions would become fact-based litigation with discovery and full-blown trials.[4]

[4] Already, one Iowa district court has applied the decision to reject a motion to dismiss a challenge to the State's local option sales tax statute under the Equal Protection Clause. The ruling appears to be based on the notion that the challenge should be measured by evidence rather than rational speculation. *See Coalition for a Common Cents Solution v. State*, No. EQCV26737 (Iowa) (October 8, 2002) ("[T]he statute does not set out the legislative basis for the local option sales tax. It would be pure speculation on the part of this Court to make such

(Continued on following page)

3. The Iowa Supreme Court Improperly Questioned the Fairness of the Tax Rates.

The Iowa Supreme Court's decision appears to question the fundamental fairness of the escalating tax rate on racetracks. Statements that the wagering tax "disabl[es] an industry it was allegedly designed to aid" and may "drive the racetracks out of business" demonstrate the Court's disagreement with the legislature's tax policy. (Cert Pet. App. 15). The Iowa Supreme Court falls short of labeling the tax rates a violation of substantive Due Process and for good reason – this Court has been rejecting Due Process claims in tax cases for more than 130 years.

Except in "rare and special instances," the Due Process Clause is not a limitation upon the taxing power conferred upon Congress or a state legislature. *Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934). The appropriate level or rate of taxation is essentially a matter for legislative resolution. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 (1981). The wisdom or fairness of a tax is not subject to the control or revision of the courts. *International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435, 444 (1944).

This Court has "consistently refused either to undertake the task of passing on the reasonableness of a tax that otherwise is within the power of Congress or of state legislative authorities, or to hold that a tax is constitutional because it renders a business unprofitable." *City of*

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a determination at this stage in the proceedings."). (Cert. Pet. App. 75-76).

Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 373 (1974). Even a tax that has the impact of "destroying a particular occupation or business" will be upheld under the Due Process Clause if the legislature had the power to enact it. *Id.* at 374; *Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 48 (1921). As stated by this Court nearly a century ago:

> [The petitioner's] reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may, when further exercised, be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. ...

Knowlton v. Moore, 178 U.S. 41, 60 (1900).

Taxpayers have unsuccessfully sought relief from tax rates they deem oppressive. *See, e.g., Veazie Bank v. Fenno*, 75 U.S. 533, 548-49 (1869) (upholding a ten percent tax on notes paid by state banks); *McCray v. United States*, 195 U.S. 27, 28, 64 (1904) (upholding a 10 cents tax on colored oleomargarine, notwithstanding a 1/4 cent tax on uncolored oleomargarine); *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. at 47-49 (upholding a license tax of two dollars a barrel upon persons manufacturing fish oil, fertilizer and meal from herring, but not salmon); *Magnano Co. v. Hamilton*, 292 U.S. at 41, 47 (upholding an excise tax of 15 cents on butter substitutes, but not butter); *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. at 378-79 (upholding a 20 percent tax on the gross receipts from private parking garages, with no similar tax for public parking garages). The only judicial

query is whether the legislature can lawfully levy the tax. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 563 (1935). In *Stewart Dry Goods*, the Court soundly advised potential litigants considering a challenge to a tax statute:

> He deludes himself by a false hope who supposes that, if this court shall at some future time conclude the burden of the exaction has become inordinately oppressive, it can interdict the tax.

Id. at 563.

CONCLUSION

For the foregoing reasons, the judgment of the Iowa Supreme Court should be reversed.

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Supreme Court of the United States

MICHAEL FITZGERALD, TREASURER,
STATE OF IOWA,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA,
IOWA GREYHOUND ASSOCIATION,
DUBUQUE RACING ASSOCIATION, LTD.,
and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Iowa

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QUESTION PRESENTED

Did the Iowa Supreme Court correctly hold that Iowa's legislature violated the Equal Protection Clause by enacting a 36 percent tax on slot machine revenues at racetracks, while leaving the tax on revenues of slot machines at riverboats at 20 percent?

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JURISDICTIONAL STATEMENT

This Court should dismiss the petition for writ of certiorari as improvidently granted because the Iowa Supreme Court decision rests on adequate and independent state grounds. This Court will not review decisions implicating both state and federal constitutions where the state court "make[s] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). While the Iowa Supreme Court opinion *in this case* may not have contained such magic words, their absence was purely fortuitous because the court has made such "plain statements" repeatedly in the past. That court did not need to say here what it has already stated many times. The Iowa Supreme Court cited a few federal cases for inspiration. They did not mandate the outcome.

To begin with, the Iowa Supreme Court has frequently stated that it views this Court's interpretations of the Fourteenth Amendment as merely non-binding "guidance" when it interprets the Iowa Constitution.[1] "[I]t is the exclusive prerogative of our court to determine the constitutionality of Iowa statutes challenged under our own constitution." *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999); *Putensen v. Hawkeye Bank*, 564 N.W.2d

[1] Article I section 6 of the Iowa Constitution provides: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not belong equally to all citizens."

404, 408 (Iowa 1997). The Iowa Supreme Court has diverged from that "guidance" whenever it deems it appropriate to do so. For example, just four years ago in *Callender*, the Iowa Supreme Court expressly declined to follow this Court's interpretation of the Due Process Clause as set forth in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Instead, the Iowa court endorsed Justice Brennan's dissent, and held that the *Iowa* Constitution required a putative father to be given standing to challenge paternity. 591 N.W.2d at 191-92. "[W]hile federal court analysis of similar provisions in the United States Constitution may prove helpful, those interpretations do not bind us." *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001). *See also Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 23 (Iowa 1977) (federal cases serve as guidance only); *Davenport Water Co. v. Iowa State Commerce Comm'n*, 190 N.W.2d 583, 593 (Iowa 1971) (same).

Moreover, in undertaking rational basis Equal Protection Clause analysis, the Iowa Supreme Court has deliberately charted a different path from this Court on several occasions. *See generally* Anthony Reeves, Note, "Rational Basis Revised: Iowa Equal Protection After *Gleason*, *Bierkamp*, and *Rudolph*," 67 Iowa L. Rev. 309 (1982). Thus, in *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980), the Iowa Supreme Court held that Iowa's guest statute, which prohibited guest passengers in an automobile from suing the driver of that automobile for negligence, created an improper classification in violation of Iowa's Equal Protection Clause. The court acknowledged that under the federal Constitution, it was bound by prior decisions of this Court upholding such statutes against Fourteenth Amendment challenges. *Id.* at 579. Indeed, the Iowa Supreme Court had recently held itself that Iowa's guest

statute did not violate the Fourteenth Amendment. *Bietz v. Horak*, 271 N.W.2d 755, 759 (Iowa 1978). Nonetheless, the Iowa Supreme Court invalidated the law because this Court's Fourteenth Amendment precedents were "not binding." 293 N.W.2d at 579.

Other examples of the Iowa Supreme Court's distinctive rational basis jurisprudence include: *Gleason v. City of Davenport*, 275 N.W.2d 431, 435-36 (Iowa 1979) (holding it was unconstitutional for the Iowa legislature to require notice of a claim to be given within 30 days to charter cities but only within 60 days to other municipalities); *Miller v. Boone County Hosp.*, 394 N.W.2d 776, 780-81 (Iowa 1986) (holding unconstitutional an Iowa law requiring notice to be given within 60 days or suit to be filed within six months for a claim against a local government); *Federal Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 157-58 (Iowa 1988) (holding it was unconstitutional for the Iowa legislature to allow a one-year redemption period for mortgages foreclosed by banks, savings and loans, and credit unions while allowing a two-year redemption period for other mortgages); and *Glowacki v. Board of Medical Examiners*, 501 N.W.2d 539, 541-42 (Iowa 1993) (holding that an Iowa law prohibiting courts from entering stays of disciplinary orders of the board of medical examiners violated equal protection as applied). Although the court decided these cases under both the Iowa and the U.S. Constitutions, its review was arguably more rigorous than this Court's would have been. In particular, the Iowa Supreme Court said it was obliged to consider "matters of common knowledge and common report" in determining whether legislation met the rational basis test. *Federal Land Bank*, 426 N.W.2d at 157; *Miller*, 394 N.W.2d at 779

(quoting *State v. Bartels*, 181 N.W. 508, 515 (1921)). This appears to go beyond federal equal protection precedents.

In rendering its opinion in this case, the Iowa Supreme Court relied mostly on Iowa precedents, such as *Bierkamp* and *Gleason*, rather than decisions of this Court. Pet. App. 6-17. While the Iowa Supreme Court "usually" interprets the federal and Iowa Equal Protection Clauses the same way, *see Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002); *Krull v. Thermogas Co.*, 522 N.W.2d 607, 614 (Iowa 1994), that is a matter of judicial preference only. As the foregoing discussion demonstrates, the Iowa Supreme Court has not hesitated to stake out its own position when it disagrees with this Court, particularly in rational basis cases.

An additional factor that must be considered here is Iowa's constitutional mandate that the legislature "encourage, by all suitable means, the promotion of ... agricultural improvement." Iowa Const. Art. IX 2nd § 3; *Dickinson v. Porter*, 35 N.W.2d 66, 76 (Iowa 1948) ("We have frequently referred to agriculture as the basic industry in this state. . . . It is not debatable that it is part of the public policy of this state, evidenced by our constitution and numerous statutes, to encourage agriculture."). The Iowa racing industry is, of course, part of Iowa agriculture. *See* Iowa Code § 99D.22(1) (requiring certain minimum use of Iowa-foaled horses and Iowa-whelped dogs by licensed racetracks). In this case, the Iowa Supreme Court specifically noted that the discriminatory tax thwarted the promotion of agriculture. Pet. App. 13. This is yet another reason why the Iowa court could be expected to stand by its previous judgment, regardless of this Court's ruling.

Finally, state's rights are involved here. These are Iowa issues, affecting Iowa citizens, resolved by a court which, until this month, convened in the same building as the Iowa legislature. It knows that legislature well. Because of the state's current budget difficulties, the Iowa Supreme Court realized its decision would be controversial, but that did not dissuade it from invalidating the discriminatory tax under both the Iowa and the U.S. Constitutions. There is no reason to believe that the Iowa Supreme Court's already expressed views on the constitutionality of Iowa Code § 99F.11 under the Iowa Constitution would be altered by a decision of this Court concerning requirements of the U.S. Constitution. As the Iowa Supreme Court has said on another occasion, "Unquestionably, this court must determine Iowa constitutional requirements, and in so doing is under no obligation to uphold a local statute merely because the United States Supreme Court has deemed it not unconstitutional." *Huff*, 256 N.W.2d at 23.

STATEMENT OF THE CASE

I. Introduction.

This case concerns the Iowa legislature's decision, as part of a rescue plan for Iowa's non-profit racetracks, to deprive those racetracks of up to 36 percent of their main source of revenue. When identical slot machines are used in the same way on for-profit riverboats, the state's maximum tax rate is only 20 percent. The Iowa Supreme Court found that this discriminatory tax on slot machine revenues at racetracks was not rationally related to a legitimate goal that conceivably could have been the Iowa legislature's actual purpose.

No one here disputes the observations of the Iowa Supreme Court that the racetracks and the riverboats "exist for the purpose of operating gambling games," "operate within the same gaming industry," "operate slot machines that are the primary revenue-making vehicle for both facilities," and "serve gambling games to the same group of consumers." Pet. App. 8-9. The simple fact is: the legislature has imposed an 80 percent higher tax on the same revenues from the same machines being used by the same types of customers, based purely on the location of those machines.

II. The Discriminatory Tax.

Iowa Code § 99F.11 imposes a tax *generally* on the adjusted gross receipts received from gambling games of 5 percent on the first $1 million of adjusted gross receipts annually, 10 percent on the next $2 million of adjusted gross receipts, and 20 percent on any adjusted gross receipts in excess of $3 million. Iowa Code § 99F.11 (first sentence).[2] Until 1994, only riverboats could offer gambling games, including slot machines and table games. The revenues from those games were taxed in accordance with the foregoing law at a maximum rate of 20 percent.

In 1994, however, the Iowa legislature ("the General Assembly") enacted H.F. 2179, which legalized slot machines at racetracks, but subjected any "gambling games at racetrack enclosures," beginning January 1, 1997, to a

[2] Adjusted gross receipts are the gross receipts less winnings paid to wagerers. Iowa Code § 99F.1. Thus, this is a tax on revenues, not profits.

special tax rate that would escalate annually up to 36 percent on adjusted gross receipts in excess of $3 million. The challenged provision, which became the second sentence of Iowa Code § 99F.11, read as follows:

> However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetrack enclosures is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is thirty-six percent.

III. Taxation of Slot Machine Revenues in Other Jurisdictions.

No other state in our nation has such a discriminatory tax. J.A. 178. Other states that allow slot machines and/or video lottery terminals generally tax their revenues at an identical rate regardless of where the machine is located. For example, that is true in Montana, Nevada, Oregon, South Carolina, and South Dakota. J.A. 177. Louisiana, the only state besides Iowa that authorizes slot machines on riverboats and at racetracks, has a slightly lower tax rate (18 percent vs. 18.5 percent) for slot machines at racetracks. Louis. Rev. Stat. §§ 27:91, 27:393; J.A. 178. New Mexico permits video lottery terminals at racetracks and in other locations, and its gaming tax is uniformly 25 percent of the "net take." New Mexico Stat. § 60-2E-47. No other state has a tax that is 80 percent higher based solely on the location of the gambling device. J.A. 178.

Furthermore, no other state has an adjusted gross receipts tax on gaming revenue that approaches 36 percent. Illinois recently enacted a tax of 35 percent on an entity's annual adjusted gross gaming receipts above $100 million. However, the effective Illinois tax rate is much

lower because the 35 percent rate only applies when annual receipts exceed $100 million. 230 Ill. L.C.S. § 13; J.A. 178.

IV. The Legislative History of the Discriminatory Tax.

The essential facts surrounding the enactment of this unique tax are undisputed. By 1993, all the racetracks in Iowa were in financial crisis. Their racing and parimutuel betting operations were quickly losing money. Respondent Racing Association of Central Iowa ("Prairie Meadows"), based in Altoona, Iowa (outside of Des Moines), had entered bankruptcy in 1991. It emerged from bankruptcy in 1993, but continued to lose money. Respondents Iowa West Racing Association ("IWRA") and Dubuque Racing Association, Ltd. ("DRA"), which operated racetracks in Council Bluffs and Dubuque respectively, were also losing money. The Council Bluffs track ("Bluffs Run") was near insolvency. J.A. 113, 130, 139, 145.

Additionally, the Iowa riverboats were being threatened by competition from other states, particularly Illinois, which allowed excursion gambling on the other side of the Mississippi River without Iowa's stringent loss limits of $200 per excursion and $5 per hand or play. J.A. 153, 158, 163-64, 169-70.

Before the commencement of the 1994 session of the Iowa legislature, a consensus agreement was reached among representatives of the racetrack and riverboat interests and legislators from the affected areas. The consensus legislation provided for slot machines to be authorized at racetracks, the elimination of loss limits on riverboat gambling, and continuation of the existing 20

percent maximum tax rate on adjusted gross receipts from gambling games. This consensus agreement was set forth in legislation which 12 members of the Iowa House introduced as an amendment to H.F. 2179. J.A. 154-55, 159-60, 164-65, 170-71.

On March 15, 1994, however, a state representative from Woodbury County, a county on the Missouri River which contains a riverboat but no racetracks, offered an amendment that provided for a 40 percent adjusted gross receipts tax on gambling games at racetracks. Neither he nor any other supporter of the amendment gave any reasons in the House debate for a higher tax on the same machines at racetracks. J.A. 155, 160, 165-66, 171-72.

On March 17, after meeting with supporters of the consensus legislation, this representative agreed to have his amendment reconsidered so that the highest rate on gambling games at racetracks would be 36 percent rather than 40 percent of adjusted gross receipts, and to provide a two-year moratorium (*i.e.*, until January 1, 1997) for the higher rate to begin to take effect in order to give racetrack supporters an opportunity to repeal the tax disparity in the next General Assembly. J.A. 155-56, 161, 166, 172.

As so amended, H.F. 2179 passed the Iowa House that day. It later passed the Iowa Senate and was signed by the Governor. The Speaker of the Iowa House, who was a gambling opponent and controlled the House agenda, had made it clear that he would allow H.F. 2179 to be considered only once in the House. Thus, as a practical matter, any effort to remove the discriminatory tax in the Senate would have defeated the entire legislation. J.A. 155-56, 160-61, 165-66, 171-73.

The text of H.F. 2179 leaves no doubt that slot machines were intended to save the racetracks from financial oblivion. For example, the legislation states that these slot machine revenues, after payment of operating expenses and taxes, shall be used first to pay any "unpaid debt from the parimutuel racetrack operations." *See* Iowa Code § 99F.6.

However, the Iowa legislature failed to amend § 99F.11 in subsequent sessions. Thus, in 1997, the higher tax rate began to take effect for slot machine revenues at racetracks only. By June 2002, the date of the Iowa Supreme Court's decision, it had reached 32 percent and was scheduled to reach 36 percent by 2004. No other activity is taxed by the State of Iowa at a rate of 36, or for that matter, 32 percent. By way of comparison and contrast, Iowa imposes a 22 percent tax on sales of tobacco products. Iowa Code § 453A.43.

V. The Impact of the Discriminatory Tax.

As noted above, each of the Respondents is a non-profit entity. By Iowa law, these entities are required to distribute any net income (not used to pay off debts or to supplement horse or dog purses) for educational, civic, public, charitable, patriotic or religious uses. Iowa Code § 99F.6(4)(a). As a practical matter, this means that the net income of the Respondents is plowed back into the community, either through payments to local governments or through charitable contributions.

Respondent Prairie Meadows has distributed over $186 million to Polk County (the county that includes both Altoona and Des Moines) and over $12 million to various charities from 1995 through 1999. Respondent DRA has

distributed over $7.5 million to charities and over $27.5 million to the City of Dubuque. Bluffs Run has distributed over $45 million to various educational, civic and charitable organizations in over fourteen counties in southwest Iowa since 1995. J.A. 123-24, 129, 141-42.

Each of the racetracks continues to lose money today on the racing portion of its operations, and depends on slot machine revenues for survival. However, as the higher tax on gaming revenues from slot machines at Iowa racetracks has phased in, that tax has had a predictably adverse impact on the racetracks. Had the Iowa Supreme Court not struck down the tax, Respondent Prairie Meadows would have had little or no profits to distribute to Polk County and charities by 2003 or 2004. Meanwhile, Respondent DRA anticipated that it would have to close its facility, with a resulting loss of economic and employment benefits. It is also undisputed that Bluffs Run, which competes with riverboats in the same community, was competitively disadvantaged by the disparate gaming tax. J.A. 125, 134, 142-43, 145-47.

Petitioner's claims of a "financial bonanza" or a "windfall" for the Respondents are contrary to the record.[3] Although Petitioner does not dispute that one of the three racetracks would go out of business, he engages in pseudo-accounting (which he did not present in the Iowa courts) to try to argue that the other two tracks would "thrive" under

[3] Respondents' statement of undisputed facts was originally filed in the Iowa district court and is set forth in the Joint Appendix at pages 97-110. If Petitioner had wanted to contest any of those facts, he was required under Iowa procedure to file a statement of disputed facts, Iowa R.Civ.P. 1.981(3), which he did not do.

a 36 percent tax rate. Pet. Br. at 30 n.3. Petitioner's arguments are based on unwarranted inferences from overall revenues or certain categories of expenses only.

Revenues alone do not disclose how a racetrack is performing. It is undisputed that Respondent Prairie Meadows' "profits" (*i.e.*, what it distributed to local governments and charities) were already declining precipitously as the tax rate on revenues escalated toward 36 percent. J.A. 124. Nor are racing-related expenditures a barometer of financial health: in Iowa, racetracks are *legally required* to make those kinds of expenditures. *See* Iowa Admin. Code §§ 491-1.7(12), (13) (in deciding whether to grant or renew a license, the Iowa Racing and Gaming Commission shall consider whether the racetrack would nurture the racing industry and maximize purses).[4]

VI. Proceedings in the Iowa Courts.

Respondents originally brought this action in the Iowa District Court for Polk County. They challenged the second sentence of Iowa Code § 99F.11, which established the discriminatory tax on adjusted gross receipts from slot machines located at racetracks, as unconstitutional on several grounds. On December 4, 2000, ruling on cross-motions for summary judgment, the district court upheld the discriminatory tax and dismissed Respondents' claims.

[4] The United States, but not Petitioner, claims that Iowa riverboats actually have higher operating costs than Iowa racetracks. U.S. Br. at 12. That assertion is refuted by the undisputed evidence in this case. J.A. 125, 127.

Significantly, although Petitioner urged five possible justifications for the discriminatory tax under the rational basis test, including obviously insubstantial justifications like "revenue maximization," the district court accepted none of Petitioner's arguments. Instead, it came up with its own justification – that the legislature could have intended that river towns or riverboats receive "a beneficial tax rate" as a means of promoting their interests. *See* Pet. App. 34.[5]

On appeal, the Iowa Supreme Court reversed. To begin with, it noted:

> [T]he heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. . . .

Pet. App. 8.

Critically, the Iowa Supreme Court then pointed out – and Petitioner had never argued otherwise – that the Iowa legislature's undisputed purpose in 1994 was to save the racetracks and the riverboats from economic distress. Levying an 80 percent higher tax on the revenues from slot machines at racetracks frustrated that goal. Reviewing both the justification developed by the district court and the various justifications advanced by the State, the court concluded that "[e]ach justification ignores the plain

[5] Petitioner characterizes this as three separate justifications. Pet. Br. at 23. Regardless, they are all "promotional" justifications, and none of them was initially urged by Petitioner.

fact that this differential tax completely defeats the alleged purpose of the 1994 legislation." Pet. App. 15. The court added:

> At a minimum, the tax frustrates the legislative purpose in permitting racetracks to operate. The legislation goes even further, however, by disabling an industry it was allegedly designed to aid.

Pet. App. 15.

On January 17, 2003, this Court granted the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This case presents the question whether a unique and draconian tax should be upheld despite a record affirmatively demonstrating that the tax is not rationally related to – and indeed undermines – the legislature's actual purpose. Since legislatures do not normally act in such an arbitrary manner, we need to ask how that happened here. It occurred because a legislator from a riverboat district was able to add a last-minute "poison pill" amendment to legislation authorizing slot machines at racetracks. The amendment provided for a confiscatory tax on slot machine revenues at racetracks, but not at riverboats. Because the legislature was nearing the end of its session, and the racetracks were facing their financial demise, the supporters of the legislation decided to swallow this unpalatable medicine with slight modifications and a delayed start date, figuring they could eliminate it in a later legislative session before it took effect. That never happened. So, the Iowa courts had to sort out this messy

situation involving a law that the legislature had intended to revise, but never had revised.

The Iowa Supreme Court, which was far closer to this controversy than many of the parties who now offer their advice to this Court, reviewed the record, including the unrebutted legislator affidavits, and held that the discriminatory tax was not rationally related to the Iowa legislature's unquestioned purpose of helping the racetracks (and the riverboats) recover from economic distress. Legislatures can do many things, but they cannot target a small class of entities for adverse treatment in the guise of helping them, as happened here. It is inherently arbitrary for a legislature to bless an industry, as the Iowa legislature did with the gaming industry in H.F. 2179, and then at the same time to subject some of the participants in that industry to an incapacitating tax burden with no other purpose than to harm them.

After fully considering these points, the Iowa Supreme Court struck down the second sentence of Iowa Code § 99F.11 as violating the Equal Protection Clauses of the Iowa and U.S. Constitutions.

The Iowa Supreme Court's application of the Fourteenth Amendment's Equal Protection Clause was correct and should be upheld by this Court. The Iowa court rightly characterized the case as a "rational basis test" case, and recognized that the Respondents had a "heavy burden" and had to "negate every reasonable basis upon which to uphold the statute." However, as the Iowa Supreme Court put it, "[R]ational basis review of a taxing scheme is not tantamount to no judicial review." Pet. App. 7. This Court has agreed. *Mathews v. De Castro*, 429 U.S. 181, 185

(1976) (observing that rational basis review is not "toothless").

Hence, this Court has invalidated taxation schemes under the Equal Protection Clause where warranted. *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336, 344-46 (1989) (striking down discriminatory property tax assessment scheme); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985) (striking down modest property tax exemption accorded to Vietnam War veterans who were New Mexico residents before May 1976); *Williams v. Vermont*, 472 U.S. 14, 22-24 (1985) (reversing dismissal of a challenge to a Vermont vehicle use tax exemption).

In particular, even in the realm of economic regulation, the Equal Protection Clause stands as a bulwark against "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (reversing dismissal of equal protection claim) (quoting earlier cases). And this protection against intentional and arbitrary discrimination would be meaningless if legislation could be upheld based on synthetic justifications that conflict with the undisputed actual purpose of the legislature.

This Court has repeatedly recognized this very point. Thus, while it has said that the rational basis test permits a law to be sustained by "rational speculation," *Heller v. Doe*, 509 U.S. 312, 320 (1993), a law may not be upheld when "the facts preclude[] any plausible inference" that an asserted justification was the actual legislative purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 16 (1992). In other words,

positing a justification that "could not have been the genuine goal of the legislation" (to borrow the Iowa Supreme Court's paraphrasing of *Nordlinger*) goes beyond the permissible boundaries of the rational basis test. "[T]his Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant government decisionmaker." *Id.* at 15 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959)).

This line of authority makes it impossible to maintain that real-world facts are always irrelevant. Under the rational basis test, a court has a duty to accept unrebutted facts when they show that a claimed purpose could not have been the legislature's actual goal. Conversely, when presented with the kind of record that Respondents have submitted, courts are not required to engage in Alice-in-Wonderland reasoning that a punitive tax on racetrack revenues, which was not planned to take effect, was really an effort to promote the economic development of riverboats or river towns. Nor are they required to indulge other fictions – for example, that the legislature was compensating for the greater mobility of riverboats, or that it was accounting for their supposed (but really nonexistent) higher costs. Because the Iowa Supreme Court correctly concluded that the asserted justifications could not have been the legislature's actual goal, it properly struck down this bizarre tax law that takes away over a third of slot machine revenues from racetrack casinos, while allowing riverboat casinos to retain four-fifths of those identical revenues.

ARGUMENT

THE IOWA SUPREME COURT'S APPLICATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO IOWA CODE § 99F.11 WAS CORRECT AND CONSISTENT WITH THIS COURT'S PRECEDENTS

I. The Rational Basis Test Is Not a License to Spin out Justifications for a Law that Could Not Conceivably Have Been the Legislature's Actual Goal.

A. The *Nordlinger/Allegheny Pittsburgh* Principle.

The Iowa Supreme Court followed the correct analytical framework in this case. It held – and Respondents agree – that all possible justifications given for the discriminatory tax must be negated. Pet. App. 7; *Hooper*, 472 U.S. at 618-22 (striking down a New Mexico law after rejecting both justifications that had been accepted by the New Mexico court). Under this Court's rational basis precedents, however, a justification for a legislative classification is insufficient if it fails to meet one or more of the following three requirements: (a) legitimate state purpose; (b) reasonable relationship between means and ends; and (c) the purpose could have been a plausible basis for the legislation. Thus, even though most legislation passes the rational basis test, there are three ways to overcome a potential justification.

This is confirmed by this Court's decisions which embody the following rules:

- To satisfy the rational basis test, the classification must further a legitimate state purpose. For example, in *Hooper*, this Court struck down the New Mexico veteran's tax exemption for pre-1976 residents because it did not further a legitimate state purpose. 472 U.S. at 623.

- The relationship between the classification and its goal must not be "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). There must be a "reasonable" relationship, not a "casual" relationship, between the means and the ends. *Williams*, 472 U.S. at 23 n.8. Thus, in *Romer v. Evans*, 517 U.S. 620 (1996), this Court applied the rational basis test to invalidate Colorado's anti-gay rights amendment, rejecting several asserted justifications (such as private citizens' freedom of association) on the ground that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." *Id.* at 635.

- Even if the purpose is permissible and the means are not attenuated, that may not be enough. If the party challenging the legislation can show that the asserted "justification" could not actually have been relied upon, then it may not be used to uphold the statute. *Nordlinger*, 505 U.S. at 15-16.

The Iowa Supreme Court adhered to these established principles in its decision. It carefully considered both the justifications that had been advanced by Petitioner and the one that the trial court had relied upon. Pet. App. 11-15. Citing *Nordlinger*, it found that these asserted justifications could not be reconciled with the undisputed actual purpose of the legislation.

As this Court said in *Nordlinger*, "[T]his Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Id.* at 15. The *Nordlinger* Court gave *Allegheny Pittsburgh*, 488 U.S. 336, as an example of a case "where the facts precluded any plausible inference" that the asserted purpose for a taxing scheme was the actual purpose. 505 U.S. at 16.[6] In *Heller*, 509 U.S. at 321, this Court reaffirmed that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."

In other words, while a court is entitled to engage in "rational speculation" concerning the legislature's goal, and that speculation need not be supported by actual evidence, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), the court may not attribute a purpose to the legislature that the record affirmatively shows could not have been the legislature's goal. "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislature." *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 n.16 (1975).

[6] The "facts precluded" language appears to be an echo of this Court's famous description of the rational basis test in *United States v. Carolene Prods. Co.*: "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of *the facts made known* or generally assumed it is of such a character as to *preclude the assumption* that it rests upon some rational basis within the knowledge and experience of the legislators." 304 U.S. 144, 152 (1938) (emphasis added).

See also Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 463 (1988) (stating that legislation should not be upheld when "the legislative facts on which the legislation is apparently based could not reasonably be conceived to be true by the governmental decisionmaker") (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

Allegheny Pittsburgh, a tax case, illustrates this point. There, a West Virginia county followed a method of property assessment that resulted in only minor adjustments to assessed value for property tax purposes until a property was sold, at which time a full market value adjustment would be made. While the Court suggested in *Allegheny Pittsburgh* and confirmed in *Nordlinger* that this method of property tax classification might have served a legitimate goal and thereby met the rational basis test in an appropriate case, it did not do so there because relevant sources showed that West Virginia had intended to adopt a true market value approach. In short, the legislation failed the rational basis test because the hypothetical goal advanced in the litigation conflicted with the unquestioned actual legislative goal of a market value method of property assessment. *Allegheny Pittsburgh*, 488 U.S. at 345.

The Iowa Supreme Court correctly held that this was an *Allegheny Pittsburgh*-type of case. The undisputed purpose of the 1994 legislation was "to help the racetracks recover from economic distress." Pet. App. 11. Yet the legislation "also increased the tax on racetrack slots at a rate eighty percent higher than the tax imposed on riverboat slots." *Id.* One cannot justify such a surtax as a way of promoting riverboats or river towns, as the trial court attempted to do, because such a justification does not comport with "the realities of the subject addressed by the

legislation." *Heller*, 509 U.S. at 321. As noted by the Iowa Supreme Court, the 80 percent higher tax burden on slot machine revenues at racetracks would be a rational way of promoting the riverboat gambling industry only if "the reason for it was to drive the racetracks out of business" – a purpose which is illegitimate and which also conflicts with the unquestioned actual goal of the 1994 legislation. Pet. App. 14.[7] To put it another way, this is another one of those admittedly rare cases where the discrimination is simply irrational in the context of the undisputed legislative goal.

B. Petitioner's and the United States' Arguments Against the Application of That Principle Miss the Mark.

To try to escape this logic, Petitioner now makes three separate arguments, none of which is availing. First, Petitioner argues that *Allegheny Pittsburgh* is limited to situations where the legislative purpose was expressly written into law. Pet. Br. at 22. According to Petitioner: "In the absence of such codification of the purpose of a law, courts may look to state interests for a law articulated by legal counsel defending the classification or to state interests for the law found by lower courts, or may itself identify another possible state interest that would justify the law." *Id.*

[7] As this Court has noted, a bare desire to disadvantage or harm a particular group is not a legitimate state interest. *Cleburne*, 473 U.S. at 447.

This is a misreading of this Court's precedents. Nothing in *Allegheny Pittsburgh* indicates that the legislative purpose has to be codified. Rather, this Court said it would look to any "authoritative source," including the opinions in that case of the West Virginia Supreme Court and Court of Appeals. 488 U.S. at 345. Here, the Iowa Supreme Court (an "authoritative source" in this Court's view) found that the legislative purpose behind the 1994 legislation was undisputed. Federal courts, including this Court, should defer to that determination, especially when there is no evidence to the contrary. *See Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (discussing a severability question and holding that "[t]he task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court"); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952) (holding that this Court should defer to factual determinations of a state supreme court absent exceptional circumstances).

It is true that in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 460-64 & n.6 (1981), a rational basis equal protection case, this Court declined to defer to the Minnesota Supreme Court's findings regarding the anticipated consequences of the challenged law. There, the plaintiffs had presented empirical data to show that the law would not achieve its intended purpose. The Minnesota Supreme Court accepted the plaintiffs' data, although the evidence was "in sharp conflict," and invalidated the law. This Court reversed, noting that "[w]here there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the

legislature was mistaken." *Id.* at 464. Two critical distinctions exist here. First, there is no conflict in the evidence; Respondents' facts are unrebutted. Second, and even more importantly, Respondents' evidence primarily addresses an entirely different subject – *i.e.*, not the expected effects of the differential tax (which were self-evident anyway), but the circumstances surrounding the enactment of the legislation. There is no precedent of which we are aware for this Court to second-guess the findings of a state supreme court on uncontradicted evidence regarding a state legislature's intent and purpose.

Similarly, *Nordlinger* in no way supports Petitioner's "codification" rule. *Nordlinger* did not say that the only "facts" capable of "precluding" an asserted legislative purpose are those expressly written into a statute. Indeed, had this Court intended to adopt such a rule, it could have said so, but it did not. And such a rule would make little sense. If that were the rule, a legislature could insulate its actions from review simply by omitting a "purpose" clause from the statute, as the Iowa legislature did here.[8]

Second, Petitioner criticizes the Iowa Supreme Court for considering legislator affidavits, suggesting that this was somehow improper. Pet. Br. at 28-29. However, the Supreme Court decision cited by Petitioner, *Bread Political Action Committee v. Federal Election Comm'n*, 455 U.S. 577, 581 n.3 (1982), holds only that the *post hoc* views of a single legislator concerning legislative intent carry little

[8] Notably, *Nordlinger* emphasized that *Allegheny Pittsburgh* applies to challenges to statutes as well as administrative actions. *Id.* at 16. n.8.

weight. In a more recent election law case, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 (2000), this Court credited a single legislator's affidavit, the difference apparently being that the legislator there was co-chair of the relevant committee and was testifying not as to what a statute meant, but as to concerns the legislature was attempting to address. As in *Nixon*, the affidavits here are not *post hoc* attempts to interpret a statute; rather, they are historical recitations of events by major participants in those events. J.A. 152, 157, 162-63, 168, 174. *See also Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (considering the affidavits of two legislators regarding the purpose behind a redistricting plan). As this Court has previously recognized, those events are relevant to equal protection analysis in a case like this. *See Weinberger*, 420 U.S. at 648 n.16 (approving "an examination of the legislative scheme and its history").

Moreover, as a matter of precedent and common sense, whether an Iowa court will consider affidavits of Iowa legislators should be a matter of *Iowa* law. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 309 n.5 (1945) ("a state court may determine for itself what sources of extrastatutory enlightenment it will consult") (holding that a state court is not obligated under the Fourteenth Amendment to take testimony from state legislators). Petitioner implicitly recognizes this point by citing two *Iowa* cases to this Court. This means, however, that Petitioner has no cause to complain *in this Court* because the Iowa Supreme Court considered the legislators' sworn testimony. In any event, Petitioner also has an incorrect view of Iowa law. The two Iowa cases that he cites discuss a legislator's private interpretation of a statute, which is not the situation here. Long ago, the Iowa trial court

rejected those Iowa decisions as inapposite. In denying Petitioner's motion to strike the legislator affidavits back in the fall of 2000, the district court cited and relied upon *Miller v. Bair*, 444 N.W.2d 487, 488 (Iowa 1989), an Iowa Supreme Court decision that took into account the affidavits of three Iowa legislators explaining the background of legislation. Pet. App. 25. *See also Donnelly v. City of Des Moines*, 403 N.W.2d 768, 771 (Iowa 1987) (stating that consideration of legislative history is appropriate).

Lastly, Petitioner creates a new argument for the benefit of this Court that "the Iowa Supreme Court improperly treated the three separate and distinct statutes enacted in 1994 as a single enactment with a single purpose. . . . " Pet. Br. at 27. This is incorrect. There was only one bill. J.A. 156, 161, 166, 172. *See* Laws of the 75th General Assembly, 1994 Session ch. 1021 ("An Act relating to gambling . . . "). And again, whether H.F. 2179 should be considered a single piece of legislation (as the Iowa Supreme Court believed it was) ought to be a matter for the Iowa courts to decide anyway.

In contrast to Petitioner, the United States does *not* argue that the scope of *Nordlinger* (and presumably *Allegheny Pittsburgh*) should be limited to legislative "codifications." It contends, rather, that *Nordlinger* is "inapposite" and the Iowa Supreme Court was being "imperceptive." According to the United States, the discriminatory tax did not defeat the purpose of the 1994 legislation to assist the racetracks because even with the tax, the racetracks were better off than before or at least the legislature could have believed they would be. U.S. Br. at 16-17. "It is obvious that Iowa racetracks are financially better off operating slot machines at a 36 percent rate than not operating slot machines at all – otherwise, they

would simply elect *not* to operate slot machines." *Id.* at 16. These arguments, however, are precluded by the facts and record, which show: (a) that the 36 percent tax rate resulted from the proposal of a riverboat legislator; (b) that a moratorium was enacted so there would be an opportunity to repeal the rate before it took effect; and (c) that the racetracks were heading rapidly downhill and had no choice but to accept whatever deal the legislature offered in the hope that they could later get the tax rate amended. Moreover, the relevant question is not whether a 36 percent tax rate eliminates all possible benefits of the legislation for racetracks, but whether the undisputed facts and record eliminate any of the possible justifications for the 36 percent tax rate and classification urged before the courts.

The fundamental question presented by this case is whether the rational basis test is just an exercise in abstract thinking. That is, are facts irrelevant? Can a statute be upheld on the basis of someone's creative thinking, even if that could never have been the justification in the real world? Historically, this Court has rejected such an approach. Rather, to determine whether government has behaved arbitrarily requires some reference to the actual context within which the government acted. *See Nordlinger*, 505 U.S. at 15-16; *Allegheny Pittsburgh*, 488 U.S. at 344-46; *Kadrmas*, 487 U.S. at 463; *Weinberger*, 420 U.S. at 648 n.16. Just three years ago, in *Olech*, this Court held that claims of arbitrary and intentional discrimination, including claims of discrimination "occasioned by express terms of a statute," state a cause of action under the Equal Protection Clause, requiring further factual development. 528 U.S. at 564-65. But if the legislature's actual goals were irrelevant, further factual development

would *never* be necessary. Rational basis cases could always be decided on the basis of the express terms of the legislative language, coupled with a minimal amount of reasoning. In short, Petitioner's position cannot be squared with this Court's decision in *Olech*.[9]

Good faith is presumed, so in a factual vacuum the Court is entitled to engage in rational speculation, but the Court cannot engage in counter-factual speculation that is refuted by the actual record. Allowing such speculation would open the door to truly arbitrary action, as when a legislature tags disfavored participants with a highly discriminatory tax in legislation whose undisputed purpose is to help all participants in that industry.[10]

This approach also is consistent with this Court's long-held views of what the term "arbitrary" means in

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[9] This Court granted certiorari in *Olech* on the question whether equal protection claims can be asserted by a "class of one." 528 U.S. at 564. This Court held that "the number of individuals in a class is immaterial for equal protection analysis," and that "subjective ill will" is not required to state a claim under the rational basis test. *Id.* at 564-65. Even though such elements are not required, this case has certain overtones that should heighten this Court's concern. As noted above, only three entities were affected by the discriminatory tax, and it was introduced by a riverboat district legislator.

[10] Petitioner argues that a legislature can tax a business to destruction if it wants to without violating the Due Process Clause. Pet. Br. at 32-33. That is an overly simplified reading of this Court's precedents. For example, in *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 378 (1974), this Court went through a factual analysis showing that due to the demand for parking in Pittsburgh, the tax would not have the deleterious impact that the plaintiffs had predicted. But in any event, this case involves something more – the inclusion of a discriminatory and devastating tax on a few industry participants in a law intended to bail out the industry as a whole.

other areas, such as a labor union's duty of fair representation. In its fair representation jurisprudence, this Court has equated the union's freedom of action with that of a legislature under the rational basis test. *Air Line Pilots Ass'n Intern. v. O'Neill*, 499 U.S. 65, 75, 78 (1991) (noting that "[e]ven legislatures, however, are subject to *some* judicial review of the rationality of their actions"). At the same time, though, this Court has made it clear that whether a union's actions are arbitrary must be measured "in light of the factual and legal landscape at the time of the union's action." *Id.* at 67. Thus, in fair representation cases, as in economic equal protection cases, rational speculation is acceptable; but speculation contrary to the undisputed "factual landscape" is not. The factual backdrop matters.

II. The Supposed Justifications Offered by Petitioner and the United States for the Discriminatory Tax Fail the Rational Basis Test.

Given that the Iowa Supreme Court followed the correct analytic framework, it is not surprising that it came to the right result. Petitioner and the United States now try to offer an array of justifications for taxing slot machine revenues at highly disparate rates solely based upon the location of the slot machine. Two points, however, are worth noting at the outset. First, Petitioner relies on at least one justification – "grandfathering" – that he has never argued before in the five years of this litigation. Second, Petitioner primarily emphasizes a justification – "promotion" – that he did not advance until this litigation reached the Iowa Supreme Court, more than two years after it was commenced. We now turn to these asserted justifications.

A. The Promotional Justification Fails the Rational Basis Test.

The best argument for the discriminatory tax, according to the current thinking of both Petitioner and the United States, is that the 36 percent tax rate on slot machines at racetracks was a rational way for the Iowa legislature to promote the interests of riverboats or river towns. Pet. Br. at 23-24; U.S. Br. at 11. However, to make this argument, these parties have to turn the factual record upside down, citing the Court to a host of tax exemption cases. Their authorities are inapposite because they involve tax *relief* for specific industries or entities intended to promote those industries, whereas the undisputed factual record shows that this case involves enactment of a tax *burden* on a narrow group of taxpayers. In short, as the Iowa Supreme Court correctly held, the "promotional" justification cannot be squared with the actual facts surrounding enactment of § 99F.11.

Consider, for example, *Allied Stores*, 358 U.S. 522, and *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), the two decisions cited most prominently by Petitioner and the United States in their briefs. In *Allied Stores*, this Court upheld an Ohio exemption from property taxes for property stored by nonresidents in warehouses. This Court concluded that it was reasonable for Ohio to try to promote the Ohio warehouse industry by encouraging nonresidents to store their goods in Ohio. 358 U.S. at 528-29. The Court did say that States "may impose different specific taxes upon different trades and professions. . . . " *Id.* at 527. Yet the Court also said that a state "may not resort to a classification that is palpably arbitrary." *Id.*

Similarly, in *Carmichael*, this Court rejected a challenge to the Unemployment Compensation Act of Alabama which exempted certain categories of employees – *e.g.*, agricultural laborers, charitable enterprises, etc. The Court said, "The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficent enterprise. This Court has often sustained the exemption of charitable institutions [citations omitted] and exemption[s] for the encouragement of agriculture [citations omitted]." 301 U.S. at 512. Ironically, in *Carmichael*, the Court was upholding a favorable tax treatment of agriculture. *See also Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 365 (1973) (upholding the elimination of the *ad valorem* tax as to personal property owned by individuals but not corporations; also observing that there were serious problems enforcing the tax with respect to individuals and that the state's plan was eventually to eliminate the tax as to everyone).

These tax exemption cases do not apply here for the plain reason that this case does not involve a tax benefit intended to boost a particular industry. The Iowa legislature did not enact a tax exemption for riverboats in 1994. A maximum 20 percent tax rate already was in effect. Instead, in legislation that was supposed to bail out the racetracks, the legislature singled them out for higher taxation. Hence, after reviewing the undisputed legislative history, the Iowa Supreme Court correctly concluded that the asserted "promotional" justification could not have been the legislature's actual goal. Pet. App. 15. It does not have a reasonable relation to the "object of the legislation." *Allied Stores*, 328 U.S. at 527. That conclusion is unassailable on this record.

This is thus a case like *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), where this Court invalidated an amendment that denied food stamp eligibility to any household containing persons who were not related to each other. Although the government argued that the amendment was rationally related to a legitimate legislative goal of preventing fraud, this Court noted that the Food Stamp Act already contained strong anti-fraud provisions. As it explained, "The existence of these provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses." *Id.* at 536-37. The same analysis applies here. The second sentence of Iowa Code § 99F.11 must be considered within the factual context in which it was enacted, because Respondents provided that context. Since these facts show that the provision was an effort to disfavor the racetracks, not a promotional tax exemption for riverboats or river towns, the "promotional" justification cannot be credited.

The United States argues that the Iowa Supreme Court "misperceive[d] the nature of rational-basis review" because it observed that a differential tax rate was not the "only" way to promote riverboat history. U.S. Br. at 17; Pet. App. 15. We agree that rational basis review does not require a legislature to pick the *best* way to do something. However, the United States has read the Iowa Supreme Court's opinion out of context. The constitutional flaw in the discriminatory tax was that it conflicted with the undisputed legislative goal of resuscitating the racetracks. The Iowa Supreme Court was merely making the additional point that the Iowa legislature could have served the alleged goal of promoting riverboats and river towns – if that were truly the legislature's goal – in many other

ways that did not conflict with that unquestioned legislative goal of preserving the tracks. *See Williams*, 472 U.S. at 23 n.8 (making a similar point).

In summary, Petitioner's characterization of the discriminatory tax as a "tax benefit" for the riverboats (Pet. Br. at 22) simply is not grounded in the realities of the legislation, *Heller*, 509 U.S. at 321, which may explain why Petitioner never asserted that justification until the trial court conceived it, more than two years after the case had been filed. The undisputed facts remain that the across-the-board tax stood at 20 percent, until a last-minute amendment raised it to 36 percent on gambling games at land-based casinos only. The fanciful notion that this was a master plan to promote riverboats and river towns "could not reasonably be conceived to be true by the governmental decisionmaker." *Kadrmas*, 487 U.S. at 463.

Furthermore, even if promotion of riverboats or river towns could have been the actual goal, the means would still have had to bear some *reasonable* relationship to those ends. A relationship that is "far removed," *Romer*, 517 U.S. at 635, or "casual," *Williams*, 472 U.S. at 23 n.8, does not suffice. Yet here, imposing a confiscatory tax on racetracks (to be phased in over a period of ten years from the date of enactment of the legislation) would be at best a very crude and indirect way of "promoting" riverboats and river towns. As the Iowa Supreme Court rightly perceived, the district court's "promotion" justification only makes sense if the tax "drive[s] the racetracks out of business, thereby helping the riverboat industry." Pet. App. 14. Not only is it "impossible to conclude" the legislature actually had this purpose in mind, *id.*, but such a means-ends relationship is highly attenuated at best.

B. The Other Asserted Justifications Fail the Rational Basis Test.

Petitioner and the United States offer several secondary justifications for the discriminatory tax in § 99F.11. These, however, suffer from similar infirmities.

Mobility. Both Petitioner and the United States claim that the legislature was justified in imposing a 36 percent tax on slot machine revenues at racetracks but not riverboats because riverboats are more "mobile." Pet. Br. at 24, 26; U.S. Br. at 12. However, neither Petitioner nor the United States cite any precedent that allows a taxing authority to discriminate in favor of groups based on their perceived ability to leave the taxing authority and thereby avoid the tax. By that logic, Iowa could impose lower taxes on wealthy urban Iowans than on less affluent rural farmers because the city dwellers could more readily move out-of-state. In fact, Petitioner's argument cuts the other way. Courts should be more concerned about protecting persons who *cannot* avoid a tax. "The fact that it may be rational or beneficent to spare some the burden of double taxation does not mean that the beneficence can be distributed arbitrarily." *Williams*, 472 U.S. at 27.[11]

[11] Furthermore, even if discriminating in favor of taxpayers that have the capability of leaving the state were an acceptable legislative purpose, the means chosen are not reasonably related to the end. The discrimination in Iowa Code § 99F.11 favors all riverboats, whether they are capable of leaving the state *or not* (such as Lakeside Casino in Osceola, which is land-locked in south central Iowa). Moreover, there is no requirement that riverboats agree to remain in the state in return for the favorable tax treatment.

Additionally, as the Iowa Supreme Court noted, Pet. App. 15, the mobility justification fails for the further reason that it could not have been the Iowa legislature's actual purpose. Contrary to the dissent's assertion, the legislature did not "create economic incentives" in the field of taxation for riverboats in 1994, Pet. App. 18, and no amount of verbal gymnastics can alter this reality.

Compensating for "high" expenses. Petitioner and the United States argue that certain expenses incurred by the riverboats (which have to make token "excursions" onto the water during the warmer months – *see* Iowa Admin. Code § 491-5.6(2)) could rationally support a higher level of taxation on slot machine revenues at racetracks. Pet. Br. at 25; U.S. Br. at 12. Significantly, Petitioner does not argue that riverboats actually have *higher* operating expenses than racetracks; that would be untrue. J.A. 127. Racetracks, unlike riverboats, must support money-losing parimutuel racing operations.

The United States argues that a 1993 "Gambling Study Committee" in Iowa (actually known as a "Gaming Study Committee") had recommended a tax of up to 24 percent on the racetracks, because they could "function with a lower operating cost." U.S. Br. at 4 n.1. The Gaming Study Committee apparently drew its conclusion about operating costs out of thin air. No financial information supported that statement. J.A. 175. In any event, the means utilized are far too attenuated and distant from the hypothesized ends to meet the rational basis test. As attested by the Iowa Senate President, who was a member of the Gaming Study Committee, the committee "never discussed or contemplated a gaming tax disparity of this degree." J.A. 176.

An 80 percent higher tax rate (36% vs. 20%) is qualitatively different from the 20 percent higher tax rate that had been recommended by the Study Committee (24% vs. 20%) because it is undisputed that the 36 percent tax poses a real threat to the economic viability of Iowa's racetracks and their community contributions. There is no conceivable justification for a confiscatory and punitive tax rate that is nearly double the rate on slot machine revenues on riverboats. Different treatments must not "be so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954). They must rest on "real and not feigned differences." *Id.*

The *Nordlinger/Allegheny Pittsburgh* rule also applies here. The record affirmatively shows that the alleged (but nonexistent) greater burdens on riverboats were *not* the basis for the discriminatory tax enacted by the Iowa legislature. The discriminatory tax did not have anything to do with the Gaming Study Committee's report. Indeed, the consensus legislation that actually emerged following that committee's work provided for all slot machine revenues to be taxed at the preexisting 20 percent rate. J.A. 155-56, 160-61, 165-66, 171-72, 175-76.

Grandfathering. Lastly, Petitioner and the United States argue that it could have been important to protect the supposedly settled tax expectations of "existing vendors" – *i.e.*, the riverboats – by not subjecting them to the higher 36 percent tax rate. Pet. Br. at 25; U.S. Br. at 13. But of course, the discrimination was not based on whether the business was "existing" or not, but whether it was a racetrack or a riverboat. Notably, Petitioner contradicts himself on the next page of his brief and hypothesizes that the discrimination could have been intended to

attract *more* riverboats, obviously none of which had settled expectations. Pet. Br. at 26.

Petitioner and the United States apparently want this Court to announce a general rule that "grandfathering" provisions always pass the rational basis test. That would be unfortunate and wrong. If that were the standard, the government could engage in the most egregious discrimination against new entrants into a business (as it has done here), while asserting the makeweight argument that it is protecting the settled expectations of the existing entrants. A careful reading of this Court's precedents indicates, however, that it has not upheld grandfathering *for its own sake* as a legitimate legislative goal, but only as a step-by-step means of achieving some other plausible goal. In particular, where the government's purpose is to *terminate* an activity or a benefit for otherwise legitimate reasons, it may do so gradually, "grandfathering" the rights of those that already engage in that activity. *See United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176-77 (1980) (Congress could phase out duplication of railroad retirement benefits and social security benefits while protecting retirees and certain existing workers); *City of New Orleans v. Dukes*, 427 U.S. 297, 304-05 (1976) (New Orleans could phase out street vendors in the French Quarter while allowing existing vendors to keep operating). No one contends that was the Iowa legislature's goal here.[12]

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[12] Grandfathering *qua* grandfathering is not an appropriate legislative goal for the same reason that rewarding those citizens who have lived longer in a state is not an appropriate goal: "In almost all instances, the business of the State is not with the past, but with the

(Continued on following page)

III. The Iowa Supreme Court Did Not Engage in Improper Fact Finding.

Petitioner's accusations of improper "fact finding" by the Iowa Supreme Court fundamentally misconceive rational basis review. We agree that the government is generally not required to prove by evidence that a piece of legislation actually *works*, *i.e.*, that it furthers a permissible goal. *Beach Communications*, 508 U.S. at 315 (holding that a legislative choice may be based on rational speculation "unsupported by evidence or empirical data"). But Petitioner is arguing something altogether different: that a court should never consider evidence in hearing a constitutional challenge under the rational basis test. If that were the case, obviously no challenge could ever succeed or even get past the Rule 12(b)(6) dismissal stage, yet some do. This Court should not embrace Petitioner's radical views. *See Clover Leaf Creamery*, 449 U.S. at 464 (noting that "parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational").

Petitioner's confusion is exemplified by his flawed attempt to analogize this case to *Central State Univ. v. American Ass'n of Univ. Professors*, 526 U.S. 124 (1999) (per curiam).[13] In *Central State*, the Ohio Supreme Court held that a law authorizing public universities to develop workload standards for professors and exempting their

present: to remedy continuing injustices, to fill current needs, to build on the present in order to better the future." *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring).

[13] The United States does not argue that *Central State* is comparable to this case.

workloads (but not those of other public employees) from collective bargaining violated the Equal Protection Clause. The State had argued that the law was an attempt to address a decline in the amount of teaching performed by professors. However, in the critical passage of its opinion, the Ohio court concluded that "not a shred of evidence in the entire record" linked collective bargaining with the decline in teaching over the last decade. 699 N.E.2d 463, 469 (Ohio 1998). This Court reversed, correctly concluding that a *lack* of evidence in the record did not "detract from the rationality of the legislative decision." 526 U.S. at 128.

However, *Central State* has no bearing here. The Iowa Supreme Court did not penalize Petitioner for failing to offer proof that the second sentence of § 99F.11 actually furthered a legitimate legislative goal. Rather, it reviewed the undisputed facts surrounding the enactment of § 99F.11, and concluded that those facts precluded an argument that the tax differential was intended to promote riverboats or river towns or to further the other asserted justifications for the statute. *See Nordlinger*, 505 U.S. at 16; *Allegheny Pittsburgh*, 488 U.S. at 344-46.

Indeed, there are two layers to Petitioner's misunderstanding of the rational basis test. To begin with, Petitioner condemns *any* consideration of evidence by the courts in rational basis cases, which is obviously too extreme. However, it is also important to distinguish between the circumstances of a legislative enactment and the enactment's subsequent effects – another distinction that Petitioner overlooks. As Respondents have already pointed out, there is ample precedent for judicial consideration of legislative history and legislator affidavits as to how the second sentence of § 99F.11 came into being. Apart from these affidavits, Respondents presented only

straightforward common-sense points regarding the impact of the discriminatory tax that were not disputed by Petitioner below. The Iowa Supreme Court captured the essence of these points in its opinion: "racetracks must pay drastically more additional tax than riverboats are required to pay" and the tax "frustrates the racetracks' responsibility to distribute money to local government and charitable organizations" and "to contribute to the overall economy of the State." Pet. App. 12-13. Those facts are self-evident and were as obvious to everyone in 1994 as they are today. They are not, and cannot be, disputed by Petitioner.

A good example of the type of analysis and outcome that Petitioner wants to foreclose is provided by *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), decided by the Sixth Circuit just a few months ago. There the court considered, and invalidated under the rational basis test, a special interest Tennessee law that forbids anyone from selling caskets without being licensed as a funeral director. The court noted that the ban had resulted from an amendment enacted presumably at the behest of the funeral directing industry seeking to protect itself from competition. *Id.* at 222, 225, 227. The court rejected a consumer protection justification urged by the state, reasoning that "[t]he history of the legislation . . . reveals a different story." *Id.* at 227. It also rejected various safety and health justifications because there was no fit between the means and ends. According to uncontested evidence received by the district court, there is simply no connection between limiting sales of caskets to funeral directors and improving health and safety. *Id.* at 225-26. Lastly, it rejected the argument that funeral directors are better equipped to deal with the human grief associated with

buying a casket by describing it as "very weak, indeed." *Id.* at 228. Concluding that the legislation was simply economic protectionism for funeral directors, and that this was an "illegitimate purpose," the court struck it down. *Id.* at 228-29.

Craigmiles – like the Iowa Supreme Court's decision in this case – is entirely in step with this Court's rational basis precedents. The Court considered all the proposed justifications given by the state; it took into account both the state's "rational speculation" and the challengers' unrebutted evidence; and it rejected the proposed justifications because they did not meet the three prongs of the rational basis test discussed above. Iowa's discriminatory tax on slot machine revenues contains all the same flaws as Tennessee's casket sales restriction, with the added proviso that it is not even a coherent piece of economic protectionism.

IV. Petitioner and the United States Have Misstated the Scope and Impact of the Iowa Supreme Court's Decision.

While warnings of dire public policy effects are to be expected in Supreme Court briefs, the language used by both the Petitioner and the United States toward the Iowa Supreme Court strikes an unusually harsh note. Pet. Br. at 14 ("Unless balance is restored in this case, an intrusive review of legislative tax policy could dramatically shift the power to solve economic problems away from elected officials and into the courtroom"); U.S. Br. at 22 ("the rationale applied by the Iowa court would produce extraordinary and unmanageable consequences"). However, their criticism is unwarranted. Several special factors in this case confirm the arbitrariness of this discriminatory

tax – and demonstrate the Iowa Supreme Court's opinion will not have the far-reaching adverse consequences predicted by these parties.

First, a slot machine is a slot machine. As anyone who has spent five minutes on a riverboat casino knows, customers do not go there to experience "river lore," but to gamble. This is not a differential tax on two different types of gambling, as in the statutory example given by the United States. *See* 26 U.S.C. §§ 4401(a)(1) & 4401(a)(2) (higher tax on illegal gambling). It is a widely disparate tax on the same revenues from the same activity conducted on the same machines, based purely on the location of those machines. This kind of bold-faced discrimination in the tax laws is rare.

Second, the discrimination is unprecedented in its magnitude. Not only would racetracks be taxed 80 percent more than riverboats on their slot machine revenues, they would be taxed at an overall rate of 36 percent, which according to the record is higher than other taxes in the nation on gaming revenue or any other tax in Iowa. *See Romer*, 517 U.S. at 633 ("Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision"). And the consequences of that discrimination would have driven one of the three racetracks out of business and curtailed the other two racetracks' ability to make governmental and charitable contributions.

Third, the discriminatory tax originated from a unique set of circumstances. At the tail end of the legislative session, it was slapped on by a riverboat district legislator, who then agreed to modify it to delay its effect and provide an opportunity for its subsequent repeal,

which never occurred. The discriminatory tax had no logical purpose within the rescue package. It penalized some of the intended beneficiaries of that package and prevented them from reaping the intended benefits. The tax inflicted harm for harm's sake on the racetracks, and thereby undermined the undisputed goal of saving the entire gaming industry in Iowa.

The Iowa Supreme Court correctly held that this amounted to arbitrary and invidious discrimination against the racetracks. "Even under the rationality test, the legislature is not entitled to pick out a group it disfavors, declare that group to be different, and then impose a special tax burden on the disfavored group." 3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law* § 18.3 at 244 (3rd ed. 1999). *See also Olech*, 528 U.S. at 564. By no stretch of the imagination was this an effort to promote economic development. *Bona fide* economic development legislation, of which many examples exist, is in no way threatened by the Iowa Supreme Court's ruling.

CONCLUSION

For the foregoing reasons, the judgment of the Iowa Supreme Court should be affirmed.

Respectfully submitted,

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No. 02-695

In The
Supreme Court of the United States

MICHAEL FITZGERALD, Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD. and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Iowa

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JURISDICTION

Respondents' concession that the Iowa Supreme Court opinion "*in this case* may not have contained" the "magic words" necessary to assert an adequate and independent state ground, Respondents' Brief at 1, disposes of the jurisdictional issue. Nearly twenty years ago this Court took a sensible approach to the resolution of the "vexing" problem of determining whether federal jurisdiction exists over issues decided under similar, and sometimes identical state and federal constitutional provisions. Jurisdictional issues are determined based on the text of the state court opinion "rather than dismissing the case, or requiring that the state court reconsider its decision . . . because of a mere possibility that an adequate and independent state ground supports the judgment. . . . " *Michigan v. Long*, 463 U.S. 1032, 1038, 1044 (1983).[1] Accordingly, this Court will assume "jurisdiction *in the absence* of a plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 1044 (emphasis added).

The argument that the Iowa Supreme Court *could have based* its equal protection decision on an adequate

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[1] This proposition was reiterated in several subsequent cases. *See Pennsylvania v. Libran*, 518 U.S. 938, 941 (1996) (stating where "adequacy and independence of any possible state law ground [was] not clear from the face of the opinion," jurisdiction was not precluded); *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (stating opinion contained no "plain statement" the "references to federal law were 'being used only for purposes of guidance, and d[id] not themselves compel the result that [it] reached,' " thus no independent and adequate ground existed to preclude review); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) (stating where opinion contained no "plain statement" the decision rested on state law, no adequate and independent ground existed to preclude review).

and independent state ground and that the Iowa Supreme Court *has done so in the past* misses the point. (Respondents' Brief at 4-5). A state court decision that rests primarily on federal law, or is interwoven with federal law, obligates the state court to make a "plain statement" about any adequate and independent state ground for the decision. Federal law played a sufficient role in the present decision to trigger this obligation.

In this case the Iowa Supreme Court relied on federal precedent at pivotal junctures in the constitutional analysis. Assessing whether the "asserted purpose behind the tax could have been the genuine goal of the legislation," the Court cites to *Nordlinger v. Hahn*, 505 U.S. 1 (1992), and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). The Court relied on several Iowa Supreme Court equal protection decisions which, like the present decision, addressed federal constitutional claims and recited the principle that the "same analysis" applies to the federal and state equal protection clauses. *See, e.g., Bowers v. Polk Co. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002) ("We therefore apply the same analysis in considering state equal protection claims as we do in considering federal equal protection claims under the Fourteenth Amendment to the Federal Constitution."); *Hearst Corp. v. Iowa Dep't of Revenue & Finance*, 461 N.W.2d 295, 304 (Iowa 1990) ("Section 6 of article 1 of the Iowa Constitution places substantially the same limitations upon the state legislation as does the equal protection clause of the fourteenth amendment."). Significant state court cases from other

jurisdictions on which the Iowa Supreme Court relied,[2] in turn, are decided on federal equal protection principles. *See Volusia County Kennel Club v. Haggard*, 73 So.2d 884 (Fla. 1954). Thus, the Iowa Supreme Court's reliance on the proposition that it applies the "same analysis" when considering federal and state equal protection claims reinforces the conclusion that the Court made no assertion of an adequate and independent state ground for the decision. (Cert. Pet. App. 6).

A statement that the issue arises under both state and federal constitutional provisions and a conclusion that both state and federal constitutional provisions have been violated is not sufficient under this Court's precedent to establish an adequate and independent state ground. *Compare Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990) ("The Superior Court's opinion refers to Art. 1, § 9, of the Pennsylvania Constitution but explains that this provision 'offers a protection against self-incrimination identical to that provided by the Fifth Amendment.'") *and Commonwealth v. Muniz*, 377 Pa. Super. 382, 386, 547 A.2d 419, 421 (1988) ("Likewise, 'Pennsylvania appellate courts have held that Article I, Section 9 of the Pennsylvania Constitution offers a protection against self incrimination identical to that provided by the Fifth Amendment.'").[3]

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[2] One state court decision relied upon by the Iowa Supreme Court to support its decision was reversed months later. *Deadwood, Inc. v. North Carolina Dep't of Revenue*, 148 N.C. App. 122, 557 S.E.2d 596 (2001), *rev'd, Deadwood, Inc. v. North Carolina Dep't of Revenue*, 356 N.C. 407, 572 S.E.2d 103 (2002).

[3] Additional cases illustrate this point. *See Florida v. Riley*, 488 U.S. 445, 448 n.1 (1989) ("The Florida Supreme Court mentioned the

(Continued on following page)

The Iowa Supreme Court has demonstrated its ability to assert an adequate and independent state ground. *See State v. Cline*, 617 N.W.2d 277, 284-85 (Iowa 2000) ("[W]e strive to be consistent with federal constitutional law in our interpretation of the Iowa Constitution, but we 'jealously guard our right and duty to differ in appropriate cases.' Indeed, the Iowa Constitution is declared to 'be the supreme law of the State . . . ,' and it is the responsibility of this court, not the United States Supreme Court, to say what the Iowa Constitution means. Therefore, our court would abdicate its constitutional role in state government were it to blindly follow federal precedent on an issue of state constitutional law. With this background, we turn now to an examination of the issue under principles of state law.") (citations omitted).

State Constitution in posing the question, once in the course of its opinion, and again in finally concluding that the search violated the Fourth Amendment and the State Constitution. The bulk of the discussion, however, focused exclusively on federal cases dealing with the Fourth Amendment, and there being no indication that the decision 'clearly and expressly . . . is alternatively based on bona fide separate, adequate, and independent grounds,' we have jurisdiction."). *Compare Kentucky v. Stincer*, 482 U.S. 730, 735 n.7 (1987) ("The court gave no indication that respondent's rights under § 11 of the Bill of Rights of the Kentucky Constitution were distinct from, or broader than, respondent's rights under the Sixth Amendment.") *and Stincer v. Commonwealth*, 712 S.W.2d 939, 940 (1986) ("The main purpose of the confrontation rule, under both the Sixth Amendment and Kentucky's Bill of Rights, is to ensure the defendant's right to cross-examine the witnesses against him."); *Compare Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987) ("Rather than containing any 'plain statement' that the decision rests upon adequate and independent state grounds . . . the opinion indicates that the Maryland constitutional provision is construed *in pari materia* with the Fourth Amendment. We therefore have jurisdiction.") *and Garrison v. State*, 303 Md. 385, 391, 494 A.2d 193, 196 (1985) ("Article 26 is *in pari materia* with the Fourth Amendment.").

Likewise, other state courts have crafted a "plain statement" with little difficulty. *See, e.g., Commonwealth v. Cass*, 551 Pa. 25, 42, 709 A.2d 350, 358 (1998) (". . . to avoid any doubt that we have rested our decision solidly on Pennsylvania law . . . we developed a four-pronged methodology that we will follow. . . ."); *Hempele v. Pasanen*, 120 N.J. 182, 198-99, 576 A.2d 793, 801 (1990) ("Before embarking on our analysis of the New Jersey Constitution, we emphasize that 'the [f]ederal cases that we cite in support of our interpretation of the New Jersey Constitution are being used only for the purpose of guidance, and do not themselves compel the result that [this Court] has reached.'" (quoting *State v. Bruzzese*, 94 N.J. 210, 217, n.3, 463 A.2d 320, 323 (1983), *cert. denied*, 465 U.S. 1030, 104 S.Ct. 1295, 79 L.Ed.2d 695 (1984)).

Respondents argue "[t]here is no reason to believe that the Iowa Supreme Court's already expressed views on the constitutionality of Iowa Code section 99F.11 under the Iowa Constitution would be altered by a decision of this Court concerning requirements of the U.S. Constitution."[4] (Respondents' Brief at 5). But Respondents misunderstand the significance of the United States Supreme Court's federal jurisdiction in this case. There is no federal jurisdiction if an adequate and independent state ground supports the state court decision. *Michigan v. Long*, 463

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[4] The Institute for Justice, as amicus curiae in support of Respondents, appears to agree that no adequate and independent state ground is asserted in the Iowa Supreme Court opinion. The Institute for Justice calls for a remand to the Iowa Supreme Court "to consider this case under state equal protection principles." (Institute for Justice Brief at 21). For reasons discussed, *infra*, a remand for this purpose would be improper.

U.S. at 1039, n.4; *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Harris v. Reed*, 489 U.S. 255, 260 (1989).

By adjudicating the merits of the present case, this Court necessarily determines that there is no adequate and independent state ground for the Iowa Supreme Court decision. Once this federal jurisdictional question is decided, the Iowa Supreme Court cannot reconsider the state court decision in order to subsequently establish an adequate and independent state ground for the decision under the Iowa Constitution.

STATEMENT OF THE CASE

The Respondents' Statement of the Case requires further clarification:

- Racetracks and riverboats are distinct businesses created for different purposes: racetracks were authorized in 1983 to support the horse and dog industries and related agricultural interests; riverboats were authorized six years later in 1989 to generate economic development along the Missouri and Mississippi rivers. Racetracks did not begin operating slot machines until 1994. (J.A. 24, 26, 28). Racetracks, therefore, operated in Iowa for eleven years without any slot machines at all.

- Legislation authorizing the differential tax rate between racetracks and riverboats was introduced as amendment H-5490 to House File 2179 which was sponsored by three legislators, one from Woodbury County, one

from Scott County and one from Polk County. (Plaintiffs Statement of Undisputed Material Facts: Exhibit 5). Riverboats are located in Woodbury County and Scott County; a racetrack, but no riverboat, is located in Polk County. (J.A. 27-28, 33). The differential tax rate, therefore, was sponsored by legislators from both riverboat and racetrack communities.

- The maximum differential tax rate of 36 percent on adjusted gross revenue from slot machines at racetracks is comparable to tax rates on gaming revenue in Colorado, Illinois and New Mexico. *See* Division C, *infra*.

- Slot machines have dramatically increased revenue at the three racetracks located in Iowa – regardless of the applicable tax rate. By 1999, five years after the racetracks began operating slot machines, the slot machines at the three racetracks produced nearly $5 billion in annual revenue. (J.A. 120-22). Applying the maximum tax rate of 36 percent to prior tax years, the two largest racetracks each would have been left with no less than $65 million and as much as $96 million per year for operating expenses and distributions to charities and local governments. *See* Division C, *infra*.

ARGUMENT

THE STATE OF IOWA DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BY TAXING THE REVENUE FROM SLOT MACHINES AT RACETRACKS AT A DIFFERENT RATE THAN IT TAXES THE REVENUE FROM ALL CASINO GAMES (INCLUDING SLOT MACHINES) ON RIVERBOATS.

Rather than engage in rational speculation to *uphold* the tax classifications, Respondents, and a narrow majority of the Iowa Supreme Court, instead speculated to find a single reason for the legislation to be deemed irrational. Respondents further confuse the equal protection analysis by asserting that multiple statutes passed in one bill have only one legislative purpose and that affidavits from five Iowa legislators are tantamount to codification of this purpose as the sole legitimate state interest. (Respondents' Brief at 22-29). From these premises, Respondents assert that rational speculation on any additional legitimate state interests that might support the differential tax rate is precluded.

Respondents' premises underlying this argument are flawed. First, the argument assumes there can be only one legitimate state interest in support of three separate statutes – the same analytic mistake that led the Iowa Supreme Court to an erroneous conclusion. Second, the argument assumes that legitimate state interests are subject to evidentiary proof by legislative affidavits – a premise directly at odds with the precedent of this Court.

On these shaky grounds, Respondents contend the racetracks suffer tax discrimination that is "unprecedented in its magnitude" – the consequences of which "would have driven one of the three racetracks out of

business and curtailed the other two racetracks' ability to make governmental and charitable contributions." (Respondents' Brief at 42). Respondents' arguments unravel under close examination.

A. The Authorization of Slot Machines at the Racetracks and the Differential Tax Rate Have Different Legislative Purposes.

Respondents draw erroneous conclusions from the fact that the authorization of slot machines at racetracks, the elimination of wager and loss limits on riverboats, and the differential tax rate were passed in a single piece of legislation in 1994. Although these three provisions were passed by the Iowa General Assembly in one bill, *see* 1994 Iowa Acts, ch. 1021, §§ 13, 19, 25, the bill included numerous changes in the law. These changes in the law had different legislative purposes. *See generally United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1981) (A single statute enacted in one bill may be the "product of multiple and somewhat inconsistent purposes that led to certain compromises.").

In Iowa one bill may contain references to numerous statutes on a single subject, so long as all of the statutes are embraced by the title. Iowa Const. art. III, § 29. The title of the 1994 bill was broadly stated as an act:

> relating to gambling and the regulation of gambling at pari-mutuel racetracks and on excursion gambling boats, providing for a county referendum, imposing a tax, allocating gaming revenues, proving an effective date, providing for other properly related matters, and subjecting violators to existing penalties. [1994 Iowa Acts, ch. 1021.]

This bill included thirty-one sections affecting four different chapters and fifteen different statutes in the Iowa Code. Not every section in this broad bill was for the sole and exclusive purpose of helping "the racetracks recover from economic distress." (Respondents' Brief at 21). For example, some sections in this bill raised the age for wagering from eighteen to twenty-one, 1994 Iowa Acts, ch. 1021, § 27, prohibited licensees from accepting credit cards to purchase coins or tokens for wagering, *id.* at § 24, and set a minimum passenger capacity for the riverboats, *id.* at § 14. The differential tax rate, like these diverse sections in the bill, had a legislative purpose separate and apart from helping the racetracks financially.

Authorization of slot machines at the racetracks in one section of the 1994 bill did not preclude the differential tax rate in another section of the same bill from serving legitimate state interests properly found through rational speculation. Simply put, the Iowa Legislature could have rationally concluded *both* that slot machine revenue would help the racetracks financially (even if heavily taxed) *and* that a lower tax rate for the riverboats would further legitimate state interests.

B. Legislative Affidavits Do Not Preclude Rational Speculation About Legitimate State Interests Which Are Furthered by the Differential Tax.

Respondents cast the Iowa Supreme Court's decision as an "Allegheny-type of case" in which the state interest to "help the racetracks recover from economic distress" has been conclusively proven by affidavits from five Iowa legislators. This "undisputed evidence," Respondents contend, established the only legitimate state interest against which the reasonableness of the differential tax

must be judged.[5] (Respondents' Brief at 21). Rational speculation cannot be so easily discarded.

The Respondents' theory is not supported by the Iowa Supreme Court's decision in this case. The Court never refers to the affidavits of the five Iowa legislators and never cites to the *Allegheny* decision as authority for its conclusion. Rather, the Court simply concludes – without distinguishing among the numerous sections of the 1994 bill, without rational speculation and without any further explanation – that the 1994 legislation was "designed to help the racetracks recover from financial distress."[6] (Cert. Pet. App. 10).

In this case the affidavits of five Iowa legislators are not tantamount to codification of a legitimate state interest. In contrast to the case at hand, *Allegheny* presented the rare circumstance in which the state's interest had been codified in the state constitution. *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336, 338 (1989). *See also Minnesota v. Cloverleaf Creamery Co. et al.*, 449 U.S. 456, 462-63 (1981) (legitimate state interests codified in state statute).

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[5] Respondents seemingly contend that the legislative affidavits establish a factual background that renders other legislative goals wholly irrational which, in turn, precludes rational speculation, Respondents' Brief at 20, *and* contend that the affidavits are tantamount to codification of one legitimate state interest, Respondents' Brief at 21. Both theories would restrict the State to a single state interest, *i.e.*, to help the tracks financially. Both theories are wrong.

[6] Earlier in the opinion the Iowa Supreme Court states that "the 1994 legislation was designed to save the racetracks *and riverboats* from financial distress." (Cert. App. 3 (emphasis added)).

Respondents' characterization of the affidavits as "historical recitations of events by major participants in those events" is not consistent with the purpose Respondents now assert. (Respondents' Brief at 25). Respondents claim the affidavits, which use strikingly similar language to relate discussion among a handful of legislators about the differential tax rate, establish "helping the racetracks recover from economic distress" as the only legitimate state interest. (Plaintiffs' Statement of Undisputed Material Facts: Exhibits 6-9). Three of these affidavits go so far as to state that "no reasons" were offered "for- taxing racetracks at a higher rate than riverboats." (Plaintiffs' Statement of Undisputed Material Facts: Exhibits 7-9).

These affidavits were admitted by the Iowa district court only as "factual background," not as evidentiary proof of a legitimate state interest. (J.A. 24-25). Indeed, the district court applied rational speculation after concluding the State is not required "to produce evidence to sustain the rationality of a statutory classification." In doing so, the district court upheld the differential tax rate as furthering legitimate state interests in promoting development of river towns, preserving Iowa's riverboat history, or encouraging a useful industry. (J.A. 32).

Respondents emphasize that the affidavits are "unrebutted." (Respondents' Brief at 24). These affidavits were admitted over Petitioner's objection. (Cert. Pet. App. 24). Because Petitioner prevailed in the district court and the district court did not rely on the affidavits to limit rational speculation about legitimate state interests, the Petitioner did not cross-appeal. (Cert. Pet. App. 24-25). To have "rebutted" the legislative affidavits in the district court by offering *contrary statements* from among the remaining

145 state legislators would have turned rational speculation into an evidentiary trial.

Admission of the affidavits as "factual background" in the Iowa district court should not now be considered conclusive evidence on the question whether the differential tax rate furthers a legitimate state interest. Iowa does not maintain records of legislative debate and has no formal legislative history. *See generally Emery v. Fenton*, 266 N.W.2d 6, 8 (Iowa 1978). Nevertheless, the Iowa Supreme Court "will not consider a legislator's own interpretation of the language *or purpose of a statute*, even if that legislator was instrumental in drafting and enacting the statute in question." *Ruthven Consol. School Dist. v. Emmetsburg Community School Dist.*, 382 N.W.2d 136, 140 (Iowa 1986) (emphasis added). The Court has explained:

> At first blush it might seem reasonable to rely upon an individual legislator's opinion of legislative intent. But we believe such testimony is generally unpersuasive. The legislative process is a complex one. A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. *What impelled another legislator to vote for the wording is apt to be unfathomable*. Accordingly we are usually unwilling to rely upon the interpretations of individual legislators for statutory meaning.

Iowa State Ed. Association-Iowa Higher Ed. Ass'n v. Public Employment Relations Bd., 269 N.W.2d 446, 448 (Iowa 1978) (emphasis added).

The affidavits of state legislators should not used to limit rational speculation by turning this into an evidentiary issue, a proposition which this Court has repeatedly rejected. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). *Cf. Minnesota v. Cloverleaf Creamery Co. et al.*, 449 U.S. at 464. Thus, whether or not any legislator offered a reason for the differential tax rate "has no significance in rational-basis analysis." *See id.* at 315.

C. The Differential Tax Rate Is Not Disproportionate to Tax Rates in Other States and Does Not Frustrate the Racetracks' Contribution to the Economy.

Respondents characterize the maximum differential tax rate of 36 percent at issue in this case as "unprecedented in its magnitude."[7] (Respondents' Brief at 42). While precise comparisons are difficult because Iowa offers a wider variety of gambling than other States,[8] the Iowa

[7] The tax rate on slot machine revenue is actually *lower* than the sales tax rate paid by Iowa residents. The wagering tax is paid only on adjusted gross revenues which are approximately ten percent of the gross revenue received by the racetracks. (*See* Petitioner's Brief at 4-5, n.1). The wagering tax would be 3.6 percent if imposed on gross revenue. Most Iowa residents, by contrast, pay 5 percent in sales tax. Iowa Code § 422.43 (2003).

[8] Iowa offers parimutuel wagering, both live and simulcast, casino riverboat gambling, Class III Indian Gaming, a state lottery and social

(Continued on following page)

wagering tax rates cannot be called "unprecedented" in "magnitude" when compared to tax rates in other state jurisdictions. For example, Colorado caps the maximum tax rate on adjusted gross receipts from gaming at 40 percent and delegates to the Colorado Gaming Control Commission authority to set the tax rate annually at, or below, this cap.[9] *See* Colo. Rev. Stat. § 12-47.1-601 (2003) *and* Colo. Const. art. XVIII, § 9. Illinois has enacted escalating tax rates which, until July 1, 2002, had a maximum rate of 35 percent on adjusted gross receipts in excess of $100 million. From July 1, 2002, the maximum tax rate on adjusted gross receipts in excess of $100 million went up to 37.5 percent and hit 45 percent on adjusted gross receipts in excess of $150 million and 50 percent on adjusted gross receipts in excess of $200 million. 230 Ill. Comp. Stat. 10/13 (2003). New Mexico imposes a "gaming tax" of 25 percent of the "net take" of a gaming operator licensee,[10] but a gaming operator licensee who is a racetrack must pay an additional 20 percent of the "net take" for purses to be distributed under the rules of the State Racing Commission. N.M. Stat. Ann. § 60-2E-47 (2002). Racetracks in New Mexico, therefore, must pay

and charitable gambling. *See* Iowa Code §§ 10A.104(10), 99B.3, 99B.5, 99B.6, 99B.7, 99D.4, 99D.11, 99E.3, 99F.3 (2003).

[9] Currently the Colorado Gaming Control Commission sets the tax at 20 percent on annual adjusted gross revenues over $15 million, but *could* raise the tax as high as 40 percent. 1 Colo. Code Regs. § 47.1-1401.

[10] Contrary to Respondents' assertion, New Mexico *does not* tax all gaming licensees uniformly. (Respondents' Brief at 7). Nonprofit organizations pay 10 percent of the "net take" while "every other gaming operator licensee" pays 25 percent of the "net take." N.M. Stat. Ann. § 60-2E-47 (2002).

out a total of 45 percent of their "net take." Iowa, by contrast, sets a tax rate higher than 25 percent on adjusted gross revenue, but does not specify by statute the percentage that must be paid out in purses. Thus, the Iowa tax rate cannot be characterized fairly as "unprecedented in magnitude."

The Respondents argue further that the tax on the racetracks is "confiscatory," "draconian," "undermines the legislature's actual purpose" of saving the racetracks and is "incapacitating." (Respondents' Brief at 14-15, 33, 36, 42). These assertions would be relevant to the resolution of this case only if helping the racetracks financially were the sole legitimate state interest in issue. Further, even if such assertions were relevant, the assertions are inaccurate.

There is very little evidence in this record on the financial condition of the racetracks, because under any proper theory of equal protection this evidence is not relevant. (Petitioner's Brief at 32-34). But the financial information from the racetracks themselves demonstrates that the two largest racetracks have been assisted enormously by the slot machines and make discretionary expenditures of tens of millions of dollars each year.

The two largest racetracks – Prairie Meadows and Bluffs Run – are dominate.[11] If Prairie Meadows had been

[11] In 1999, gross receipts at the two largest racetracks accounted for 89 percent of the industry business. (J.A. 112-27, 138-48). The Dubuque racetrack accounted for only 11 percent. Little additional financial information about the Dubuque racetrack is available in the record. (J.A. 129, 131). But nothing in the record supports Respondents'

(Continued on following page)

taxed at the rate of 36 percent from 1997-1999, it would have had in these years the following amounts to pay ordinary expenses and to fund discretionary public policy expenditures, *i.e.*, racing purse supplements, payments to Polk County and charitable contributions:[12]

1997 – $82,339,926

1998 – $83,828,564

1999 – $96,480,349

For the years 1995-1999, Prairie Meadows made at least the following in public policy expenditures:

Payment to Polk County	–	$186,000,000
Contributions to charities	–	$ 12,000,000
Horse purse supplements	–	$ 26,000,000
		$224,000,000

If Prairie Meadows were taxed at 36 percent during these years, it still could have made substantial expenditures:

	$224,000,000
Less additional tax at 36%	- $ 87,052,857[13]
Expenditures that would have been made under a 36% tax	$136,947,143

suggestion that the tax rate, alone, will force the Dubuque racetrack to close. (*See* Petitioner's Brief at 9).

[12] All of the following financial information is drawn from Respondents' affidavits. (J.A. 112-27, 138-48). Tax calculations are based on application of Iowa Code § 99F.11 to adjusted gross revenue as stated in the affidavits.

[13] For the years 1995 and 1996, the calculations assume the adjusted gross revenues were equal to 1997.

Focusing on a single year may give a clearer picture. In 1997, Prairie Meadows made combined Polk County payments and charitable contributions of $52,200,000. If Prairie Meadows paid the full 36 percent tax that year, the additional payment would have been $17,830,260. Prairie Meadows would still have had $34,000,000 for discretionary public policy payments. This racetrack was saved by the 1994 legislation.

A similar situation exists at Bluffs Run. If Bluffs Run had been taxed at the 36 percent rate from 1997-1999, it still would have had the following amounts to pay ordinary expenses and to spend on discretionary public policy expenditures:

1997 – $65,969,335

1998 – $70,295,557

1999 – $73,506,326

However, probably the best indicator of the financial condition and future of Bluffs Run is the acquisition in 1999 of Bluffs Run by a very sophisticated buyer, the Las Vegas casino company Harvey's, who was on notice that the tax rate was scheduled to go to 36 percent in 2004. (J.A. 145). Another racetrack has been saved by the 1994 legislation.

Accordingly, the figures demonstrate that the Iowa Legislature managed to help the racetracks financially while expressing a tax preference for riverboats.

CONCLUSION

In 1994 the Iowa legislature authorized slot machines at racetracks to save the racetracks from economic distress – a bold move that succeeded. This bold move did not subsume other important legislative goals. Additional portions of the same legislation established a differential tax rate on revenue from gambling games at racetracks and on revenue from gambling games on riverboats.

Applying equal protection analysis, the Iowa Supreme Court should have engaged in rational speculation about legitimate state interests that are furthered by the differential tax rates. Only if the tax classifications are based on legislative facts *which could not reasonably be conceived to be true*, should the tax classifications have been overturned. A tax preference for riverboats furthers numerous legitimate state interests, including promoting development of river communities, promoting riverboat history, promoting riverboat casinos as a useful industry, preventing riverboats from leaving Iowa, compensating riverboats for high operating expenses, protecting expectations of existing riverboats and attracting new riverboats.

For all of the foregoing reasons, the judgment of the Iowa Supreme Court should be reversed.

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In the Supreme Court of the United States

MICHAEL FITZGERALD, TREASURER, STATE OF IOWA,
PETITIONER

v.

RACING ASSOCIATION OF CENTRAL IOWA, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the State of Iowa can tax the revenue from slot machines at parimutuel racetracks and the revenue from all casino games on riverboats, including slot machines, at different rates without violating the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case addresses whether a State violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution by taxing different classes of taxpayers at different rates for similar, but not identical, activity. Although the Fourteenth Amendment does not apply directly to the United States, "[i]t is well settled that the Fifth Amendment's Due Process Clause encompasses equal protection principles." *Mathews* v. *De Castro*, 429 U.S. 181, 182 n.1 (1976). And, this Court has stated that its "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). See *Regan* v. *Taxation With Representation*, 461 U.S. 540, 546-548 (1983). The United States therefore has a substantial interest

in the correct application of the constitutional principles addressed in this case.

STATEMENT

1. Iowa authorizes two separate types of gambling establishments: racetracks and excursion riverboats. Pet. App. 3. Respondents are operators and users of racetrack gambling facilities. *Id.* at 58.

a. The authorization and taxation of these two types of gambling establishments in Iowa have separate and distinct histories. Pet. App. 59. Parimutuel gambling at racetracks was first authorized in 1983. No other form of parimutuel gambling or any other type of gambling activity was permitted in Iowa at that time. *Ibid.* No limits were imposed on the amount of any bet or on any individual's total losses for parimutuel wagering at racetracks. *Id.* at 63 n.6. A state-formed Racing Commission was established to supervise racetrack activities, and only "qualified nonprofit corporations" were permitted to conduct parimutuel wagering at Iowa racetracks. *Id.* at 59.

b. Iowa first authorized casino and other gambling games on excursion riverboats in 1989. Pet. App. 62. Riverboats were allowed to offer a broad variety of casino games as well as video machine and slot machine games. *Id.* at 63. Riverboat operators were required to create and utilize riverboats that invoked Iowa's riverboat history. They were also required to utilize Iowa resources, goods, services, employees and entertainers. *Ibid.* The Iowa legislation enacted in 1989 limited the maximum wager on any single bet on a riverboat to five dollars and limited the maximum loss for any individual passenger on a riverboat excursion to two hundred dollars. *Ibid.*

c. Prior to 1994, Iowa applied different tax rates to the revenues received by these two separate types of gambling establishments. The highest tax rate applied to the revenue from parimutuel gambling on horse or dog races was six percent. Iowa Code Ann. § 99D.15 (West 1996). Racetracks, however, received a tax credit of up to five percent of the gross sum wagered per year. Iowa Code Ann. § 99D.15(2).

By contrast, the highest tax rate applied to the revenue from gambling on riverboat casinos was 20 percent. Iowa Code Ann. § 99F.11. And, unlike the racetrack industry, the riverboat industry received no tax credit for any portion of its revenues.

2. By 1994, both riverboat and racetrack gambling had encountered serious economic difficulties in Iowa. Pet. App. 66. Attendance at Iowa racetracks had significantly dwindled (*id.* at 61), and Iowa riverboat casinos had encountered stiff competition from riverboats from neighboring States (such as Illinois) that imposed no limits on the amounts that could be bet or lost by individual gamblers (*id.* at 65). As a consequence of this competition, half of the Iowa riverboat operators left Iowa during 1992 and 1993 to operate in States that had no bet or loss limits. *Id.* at 65-66; see Pet. 7.

These economic difficulties were detailed in a study that was commissioned by the Governor of Iowa to recommend changes in the Iowa gambling laws. In response to the recommendations of that study, Iowa enacted legislation in 1994 to improve the competitiveness of the Iowa riverboat and racetrack industries. Pet. App. 67-69. The legislation assisted racetracks by permitting them to operate slot machines (but not casino games or other video gambling games) at their facilities. *Id.* at 22, 69. The legislation assisted the

competitive position of riverboats by eliminating the wager and loss limits on individual gamblers. *Ibid.*

This 1994 legislation did not change the graduated tax of up to 20 percent imposed on the gambling receipts of riverboats. See Iowa Code Ann. § 99F.11 (West. 1996). It also did not alter the six percent excise tax on parimutuel betting at racetracks. It did, however, impose a graduated tax of up to 20 percent solely on *receipts from slot machines* at racetracks. It further provided that, beginning in 1997, this graduated tax rate for slot machine receipts at racetracks would increase by two percent a year until the maximum rate reached 36 percent. Pet. App. 22-23.[1]

3. Respondents brought suit in state court to challenge the constitutionality of the differential tax imposed on racetrack and riverboat gambling receipts. They argued that, by taxing gambling receipts at racetracks at a rate higher than similar receipts were taxed at riverboats, the Iowa statute violates the Equal Protection Clauses of the state and federal constitutions. Pet. App. 48-51.

The state district court rejected respondents' claim. Pet. App. 20-40. The court found several rational bases to uphold the constitutionality of the statute. In particular, the court concluded that the differential treatment of riverboat and racetrack gambling was rationally related to the State's legitimate interest in "promoting * * * river town development,"

[1] The Gambling Study Committee established by the Iowa Governor had recommended that, because "land-based casinos could function with a lower operating cost," the State should impose a higher excise tax on racetrack gambling than on riverboat gambling. Pet. App. 68. The Committee proposed a flat rate of 24 percent for racetrack gambling, compared to the highest rate of 20 percent for riverboat gambling. *Ibid.*

"preserving Iowa's riverboat history," preventing riverboat casinos from leaving the State and thereby preserving "a needed or useful industry." *Id.* at 34.

4. By a 4-3 vote, the Iowa Supreme Court reversed the district court and held the statute to be unconstitutional. Pet. App. 1-19.

a. The court acknowledged at the outset that there are "some differences * * * between the two gaming facilities." Pet. App. 7. The court held, however, that these differences are not "sufficiently compelling" to support application of different tax rules to the similar activities that they conduct. *Id.* at 8. The court concluded that the proffered rationale of the 1994 legislation—that it sought to improve the competitive position of riverboats and racetracks in Iowa—could not support the statute, because imposing a higher tax on racetracks would simply "drive the racetracks out of business." *Id.* at 14. The court emphasized that, in its view, a lower tax rate for riverboats was not the "only" way to promote Iowa's riverboat history and was not necessary to "make Iowa riverboats more competitive with other states." *Id.* at 15. Finding no rational basis for the difference in the tax treatment of riverboat and racetrack gambling, the court held that the higher tax rate imposed on racetrack gambling violates the Equal Protection Clause of both the United States and Iowa constitutions. *Id.* at 16.[2]

[2] The Iowa Supreme Court emphasized that it would follow its longstanding practice of applying "the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim." Pet. App. 6 (quoting *In re Morrow*, 616 N.W. 2d 544, 547 (Iowa 2000) (quoting *State* v. *Ceaser*, 585 N.W. 2d 192, 196 (Iowa 1998))).

b. The dissenting judges concluded that there were several valid and rational bases for the difference in tax. They emphasized that "[r]iverboats are not the same as racetracks" but are instead "different enterprises" that "speak to different cultural traditions." Pet. App. 18. The dissent concluded that "there is no constitutional impediment to a legislature favoring diversity in cultural attractions for its citizens and tourists" and that a legislature could rationally determine that a "riverboat casino holds more romantic tourist appeal than a casino stuck in a dog track." *Id.* at 18. The dissent also noted that the advancement of riverboat gambling by a lower tax rate was a permissible method of preserving the State's river tradition and also took into account "a very pragmatic distinction between the two gambling venues" (*ibid.*):

> [R]iverboats are mobile, racetracks are not. If the economic climate turns unfavorable here, a riverboat merely unties its lines and sails elsewhere.

SUMMARY OF ARGUMENT

In a long line of equal protection decisions, this Court has emphasized that the economic and social policy choices embedded in tax legislation are not lightly to be disturbed. Legislative classifications that do not burden fundamental rights or discriminate against suspect classes must be upheld if they are rationally related to a legitimate governmental purpose. In taxation, even more than other fields, the Court has held that legislatures necessarily possess the greatest freedom in classification. If a legislature concludes that "the public interest is served" by a tax differential, "one business may be left untaxed and another taxed, in order to promote the one or to restrict or suppress the other."

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937). A legislature does not violate the requirements of equal protection by adopting a regime that taxes one segment of an industry even while it exempts another "business closely akin thereto." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584 (1937).

The Iowa Supreme Court erred by ignoring these settled rules and overturning the economic policy choices made by the Iowa legislature. The decision of the Iowa legislature to provide a lower tax rate on gambling games for its riverboat industry than for its racetrack industry is rationally related to several plausible legitimate purposes. The legislature could have concluded that, in view of a history of riverboat usage in Iowa, riverboat gambling offers a substantial attraction to a form of tourism that the State desires to promote. The legislature also could have concluded that riverboats—being more mobile than racetracks—could, in the face of financial hardship, more easily remove their business and employment opportunities to another State. The legislature also could have concluded that riverboats have a higher cost structure than racetracks and that a lower tax on riverboats is needed to allow them to remain competitive within the State. By dismissing these reasons, and by suggesting that a higher tax rate could not be applied to racetracks unless it were the "only" way to attain those goals, the Iowa Supreme Court improperly usurped the legislative function.

This Court has consistently held that the Equal Protection Clause does not impose a rigid rule of tax equalization and that singling out one particular class for taxation or exemption does not infringe the Constitution. The inconsistent analysis adopted by the Iowa Supreme Court would have startling consequences if it

were applied to federal taxation through the Fifth Amendment. The Internal Revenue Code contains numerous classifications that single out groups of taxpayers and particular economic activities for separate tax treatment. Such industry-specific revenue provisions reflect detailed policy choices made by Congress pursuant to its constitutional authority "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States * * * ." U.S. Const. Art. I, § 8, Cl. 1.

Recognizing the primary constitutional role of Congress in determining and implementing social and tax policies, this Court has consistently held that the equal protection "standard is especially deferential in the context of classifications made by complex tax laws" and that legislatures must be given "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992). The Iowa Supreme Court failed to honor and apply these established principles in this case.

ARGUMENT

I. THE IOWA LEGISLATION SATISFIES THE RATIONAL-BASIS TEST FOR REVIEWING EQUAL PROTECTION CHALLENGES TO TAX LEGISLATION.

1. This Court has repeatedly stated that in "areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach*

Communications, Inc., 508 U.S. 307, 313 (1993). See *Central State University* v. *American Ass'n of University Professors*, 526 U.S. 124, 127-128 (1999) (per curiam) (summarily reversing lower court decision that conflicted with this Court's standards for rational-basis review of equal protection challenges). This "standard is especially deferential in the context of classifications made by complex tax laws." *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992). In structuring tax laws, legislatures are given "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Williams* v. *Vermont*, 472 U.S. 14, 22 (1985)(quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). See also *Regan* v. *Taxation with Representation*, 461 U.S. 540, 547 (1983) (a "broad latitude" exists for legislative tax classifications).

In applying this deferential standard, the legislature need not have "actually articulate[d] at any time the purpose or rationale supporting its classification." *Nordlinger* v. *Hahn*, 505 U.S. at 15. The rational or logical basis for a difference in treatment that satisfies equal protection inquiry need not be stated in the statute or in its legislative history. It is enough that the court can discern a plausible justification for the distinction. *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). Once a plausible explanation for a difference in treatment is identified, judicial inquiry "is at an end." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). The task of classifying persons for favored or disfavored tax treatment "'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,' * * * and the fact that the line might have been drawn differently at some points

is a matter for legislative, rather than judicial, consideration." *Ibid.* (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 83-84 (1976)).

It is well established by the decisions of this Court that, if a legislature could plausibly conclude that "the public interest is served" by a tax differential, "one business may be left untaxed and another taxed, in order to promote the one or to restrict or suppress the other." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937). When there is a plausible public interest in promoting the activities of a specific industry, a legislature does not violate the requirements of equal protection by adopting a tax regime that favors or exempts that segment of industry even while it taxes another "business closely akin thereto." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584 (1936).[3]

2. The Iowa Supreme Court erred by ignoring these settled principles and by overturning the economic policy choices made by the Iowa legislature. As the dissenting justices below correctly concluded, the decision of the Iowa legislature to provide a lower tax rate on casino and slot machine gambling for its river-

[3] The decisions of this Court make it "abundantly clear" that the differences required to support separate tax classifications "need not be great." *State Board* v. *Jackson*, 283 U.S. 522, 538 (1931) (citing cases). For example, in *W. W. Cargill Co.* v. *Minnesota*, 180 U.S. 452, 469 (1901), the Court upheld a state license fee imposed on proprietors of warehouses situated on railroad rights of way that was not applicable "to warehouses not so situated but doing exactly the same business." *State Board* v. *Jackson*, 283 U.S. at 538. See *Bradley* v. *City of Richmond*, 227 U.S. 477, 484-485 (1913) (upholding tax imposed on banks lending money secured by salaries at different rate than tax imposed on banks lending money on commercial securities); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 158 (1911) (upholding tax that applied to corporations but not to partnerships or individuals conducting the same business).

boat industry than on slot machine games for its racetracks is rationally related to several plausible legitimate purposes.[4] Pet. App. 18; see also *id.* at 34.

"Riverboats are not the same as racetracks" but are instead "different enterprises" that "speak to different cultural traditions." Pet. App. 18 (Neuman, J., dissenting). The legislature could have concluded that, in view of a history of riverboat usage in Iowa, riverboat gambling offers a substantial attraction to a form of tourism that the State desires to promote. The advancement of riverboat gambling could also foster rivertown development and help preserve Iowa's riverboat history. See *id.* at 34. For example, the statute that authorizes riverboat gambling requires an applicant for a gambling boat license to "recreate boats that resemble Iowa's riverboat history." Iowa Code Ann. § 99F.7(3).

[4] It is factually imprecise to focus solely on these differential tax rates without also taking into consideration the separate revenue streams to which they apply. There are several ways in which gambling activities at riverboat and racetrack establishments in Iowa are treated differently. See pages 3-4, *supra*. In particular, Iowa provides certain tax benefits to racetracks (*i.e.*, a five percent tax credit and a lower tax rate on revenue from parimutuel gambling) that are not provided to riverboats. *Ibid.* Moreover, the tax on riverboats applies not only to revenues from slot machines but also to revenues from casino gambling (which is not permitted and thus not taxed at racetracks). There is thus no exactly parallel tax treatment of any particular stream of revenues at the two separate types of facilities. As we discuss in the text, however, even if that were not the case, and if Iowa simply taxed riverboats more leniently than it taxed racetracks on identical revenue streams, a preferential tax rate is permissible under the Equal Protection Clause for the reasons explained by the dissent in the Iowa Supreme Court and by the district court below. Pet. App. 18, 34.

Other rational justifications exist for this legislation. For example, the legislature could have concluded that because riverboats are more mobile than racetracks they could, in the face of financial hardship, more easily remove their business and employment opportunities to another State. See Pet. App. 34 (Newuman, J., dissenting) ("If the economic climate turns unfavorable here, a riverboat merely unties its lines and sails elsewhere."). Iowa, which had lost half of its excursion riverboats to other States by 1994, had a legitimate interest in enticing the remaining boats to stay. See page 3, *supra*. Moreover, as the State's Gambling Study Committee concluded, riverboats have a higher cost structure than racetracks and a lower tax on riverboats may be justified by the need to allow them to remain competitive within the State. See note 1, *supra*. As the district court explained in upholding the rational basis of this legislation, "the Iowa Legislature could have concluded that river boats should receive a beneficial tax rate because it is a needed or useful industry." Pet. App. 34.

This case therefore falls squarely within the ambit of the numerous decisions of this Court that have "repeatedly" held "that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1959) (citing cases). It is well established that a State does not violate the Constitution by adopting tax classifications that selectively encourage certain business activities even though other businesses "closely akin thereto" receive less favorable treatment. *Steward*

Machine Co. v. *Davis*, 301 U.S. at 584.[5] See W. Hellerstein, *State Taxation* ¶ 3.03, at 3-5 to 3-6 (3d ed. 2001); note 3, *supra*.

The State's separate tax treatment of revenues from riverboats and racetracks is also justified by the long line of cases that uphold the "grandfathering" of tax rates when new businesses are permitted to join a restricted or regulated industry. From 1989 to 1994, riverboats were the only facilities authorized to conduct casino gambling games (including slot machines) in Iowa, and they paid a maximum rate of 20 percent on revenues from such games. When the Iowa legislature authorized racetracks also to conduct slot machine gambling at racetracks in 1994, the State elected to tax this new entrant into that regulated industry at a maximum rate that began at 20 percent and grew over time to 36 percent. The State chose, however, to continue taxing riverboats at 20 percent in order to protect the riverboats' reliance on that preexisting tax rate. See pages 3-4, *supra*. This Court has clearly held that statutes that treat "existing vendors" differently from new entrants into a field of business do "not violate the Equal Protection Clause because [a legislature] 'could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in

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[5] Because Iowa riverboats and racetracks are both in-state industries, decisions rejecting state tax laws that seek to impose a preferential tax regime that favors domestic over foreign businesses are inapposite. See *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 876-883 (1985) (disparate excise taxes for residents and nonresidents violate the Equal Protection Clause if they are designed to favor local residents); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527-530 (1959) (disparate taxes for residents and nonresidents do not violate the Equal Protection Clause if they promote local development by favoring nonresidents).

continued operation.'" *Nordlinger* v. *Hahn*, 505 U.S. at 14 (quoting *City of New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976)). Such "grandfathering" classifications in tax statutes "serv[e] to protect legitimate expectation and reliance interests [and] do not deny equal protection of the laws." 505 U.S. at 13-14 (citing cases).[6]

3. Any of these reasons is sufficient under this Court's decisions for the Iowa tax classifications to withstand an Equal Protection Clause challenge. By dismissing these plausible explanations for the legislative tax classifications, and by suggesting that a higher tax rate could not be applied to racetracks unless it were the "only" way to attain those goals (Pet. App. 15), the Iowa Supreme Court improperly usurped the legislative function.

In dismissing the several plausible justifications for the State's tax regime advanced by the dissenting judges, the Iowa Supreme Court focused on the fact that a widely understood general purpose of the 1994 legislation was to alleviate economic difficulties at both racetracks and riverboat casinos. The court's assumptions that the State's differential tax rates (i) must be justified by that single purpose (Pet. App. 11) and (ii) are inconsistent with that purpose (*id.* at 13-14), however, are both unfounded.

a. This Court has made clear that "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decision-

[6] In upholding a "grandfathering" provision in a state tax regime in *Nordlinger*, the Court noted that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification . . . ." 505 U.S. at 13 (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 746 (1984)).

maker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger* v. *Hahn*, 505 U.S. at 15. It is only necessary that the plausible justifications for the state tax scheme "may conceivably" or "may reasonably" have been the purpose and policy of the legislature. *Ibid.* See *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. at 528-529. It is enough that a court can discern a plausible justification for the statute; that rationale need not be expressed in the text or history of the statute. *McGowan* v. *Maryland*, 366 U.S. at 426 (citing cases).

The court below erred by limiting its rational-basis inquiry to the specific "asserted purpose behind this tax" of "sav[ing] the racetracks and riverboats from financial distress." Pet. App. 10. Many other plausible justifications for the State's tax regime exist that are separate from and not inconsistent with that "asserted purpose." See pages 11-14, *supra*.[7] As this Court has made clear, a "legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is *any conceivable state of facts which would support it.*" *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. at 509 (emphasis added).

b. The court below further erred in concluding that the "differential tax completely defeats" the asserted purpose of "sav[ing] the racetracks and riverboats from financial distress" and "frustrates the racetracks'

[7] Here, as in *Nordlinger*, this is not a case in which the asserted general justifications for the 1994 legislation "left no room to conceive of any other purpose" for the Iowa tax regime. 505 U.S. at 16 n.7 (quoting *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. at 530).

ability to contribute to the overall economy of this state." Pet. App. 10, 13, 15. The court asserted that requiring racetracks to "pay drastically more additional tax than riverboats are required to pay" would not "save the racetracks from economic distress" but would, instead, threaten "to drive the racetracks out of business, thereby helping the riverboat industry." *Id.* at 13-14.

That reasoning, however, is factually imperceptive and legally inapposite. The court ignored the fact that the same 1994 legislation that imposed the differential tax rates also, for the first time, authorized racetracks to operate slot machines in that State. The court's finding that the "differential tax completely defeats" the purpose of saving the racetracks from economic distress (Pet. App. 15) simply fails to consider that, without the 1994 legislation, racetracks would not have been permitted to operate slot machines *at all*. The differential tax is thus imposed on revenue that, but for the 1994 legislation, racetracks would not have been able to receive. It is obvious that Iowa racetracks are financially better off operating slot machines at a 36 percent tax rate than not operating slot machines at all—otherwise, they would simply elect *not* to operate slot machines. And, the record of this case reflects that, notwithstanding the differential tax rates in Iowa, the vast bulk of the revenue currently received by racetracks comes from slot machine gambling and not from parimutuel racing.[8] Pet. App. 8-9 & n.3.

Even if the 1994 legislation had *not* been effective in aiding the commercial fortunes of both riverboats and

[8] This is so even though parimutel racing is taxed at a lower rate than the rate that applies to gaming revenues at both racetracks and riverboats. See note 4, *supra*.

racetracks, however, that would not be grounds for invalidating the legislation. For purposes of equal protection review, the question is whether it is "plausible" that this legislation was enacted to attain that purpose. *Nordlinger* v. *Hahn*, 505 U.S. at 11. It is certainly plausible that the legislature thought that the racetracks would be better off with some slot-machine proceeds than with none at all.

The Iowa Supreme Court's related assertion that the legislature's tax classification was invalid because it was not the "only" (Pet. App. 15) way to attain its goals fundamentally misperceives the nature of rational-basis review. It is not a court's function to "hypothesize independently on the desirability or feasibility of any possible alternative[s]" to the statutory classification scheme. *Mathews* v. *Lucas*, 427 U.S. 495, 515 (1976). "These matters of practical judgment and empirical calculation are for [the legislature]." *Ibid.* When economic legislation is at issue, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

Line-drawing is an unavoidable component of the legislative process, and it "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179. Although the economic choice embedded in specific tax classification provisions may seem unwise, unfair, or illogical, under rational-basis review, a court is not to "judge the wisdom, fairness, or logic of legislative choices." *FCC* v. *Beach Communications*, 508 U.S. at 313. This Court has made clear that legislatures are entitled to "large leeway in making classifications and drawing lines which in *their* judgment produce

reasonable systems of taxation." *Williams* v. *Vermont*, 472 U.S. at 22 (emphasis added). The court below thus seriously erred by substituting its judgment about effective economic policy for that of the legislature.

II. THE DECISION OF THE IOWA SUPREME COURT MISAPPLIES THE SETTLED EQUAL PROTECTION PRINCIPLES THAT THIS COURT AND OTHER FEDERAL COURTS HAVE APPLIED IN REVIEWING CHALLENGES TO FEDERAL TAX LEGISLATION.

This Court has consistently held that the Equal Protection Clause does not impose a rigid rule of tax equalization and that singling out one particular class for taxation or exemption does not infringe the Constitution. The inconsistent analysis adopted by the Iowa Supreme Court would have startling consequences if it were applied to federal taxation through the Fifth Amendment.

The Internal Revenue Code contains numerous classifications that single out groups of taxpayers and particular economic activities for separate tax treatment. Such industry-specific and taxpayer-specific revenue provisions reflect detailed policy choices made by Congress pursuant to its constitutional authority "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States * * * ." U.S. Const. Art. I, § 8, Cl. 1. Recognizing the primary constitutional role of Congress in determining and implementing social and tax policies, this Court has consistently held that Congress has "a large area of discretion" to formulate "sound tax policies" and is entitled to an "especially broad latitude in creating classifications and distinctions in tax statutes." *Regan* v. *Taxation With Representation*, 461 U.S. at 547-548.[9]

Because of the "limitless factual variations" of American commerce (*United States* v. *Correll*, 389 U.S. 299, 307 (1967)), Congress is routinely required to draw lines and adopt classifications in tax legislation that allow some persons (and not others) advantages through exemptions, deductions, transitional rules, and tax rates. The legislative allowance of such preferences and distinctions is an indispensable part of effective tax legislation and Congress therefore has been given "the greatest freedom in classification." *Harris* v. *McRae*, 448 U.S. 297, 322 (1980).

Numerous decisions of this Court have applied that basic principle in upholding a wide variety of specific federal tax distinctions against equal protection challenges. See, *e.g.*, *Regan* v. *Taxation with Representation*, 461 U.S. at 550 (rejecting an equal protection challenge to 26 U.S.C. 501(c), which subsidized lobbying by veterans organizations but not other charities); *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970) (per curiam) (rejecting equal protection challenge to 26 U.S.C. 501(c)(14)(B), which contained a "grandfather clause" that exempted only insurers organized before a certain date); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. at 509 (rejecting an equal protection challenge to a federal unemployment tax that applied to some, but not all, employers); *Flint* v. *Stone Tracy Co.*, 220 U.S. at 158 (rejecting an

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[9] "For purposes of rational-basis review, the 'latitude of discretion is notably wide in . . . the granting of partial or total exemptions upon grounds of policy.'" *Nordlinger* v. *Hahn*, 505 U.S. at 17 (quoting *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)).

equal protection challenge to a tax that applied to corporations but not to partnerships or individuals conducting the same business).[10]

The courts of appeals have also routinely applied these same principles in upholding specific classification provisions in federal tax legislation against equal protection challenges. See *Mostowy* v. *United States*, 966 F.2d 668, 672 (Fed. Cir. 1992) (rejecting equal protection challenge to transition rules of Tax Reform Act of 1986 that preserved the benefits of various prior deductions and exemptions only for certain taxpayers); *Wallers* v. *United States*, 847 F.2d 1279, 1282-1283 (7th Cir. 1988) (rejecting equal protection challenge to a "differential tax treatment" of railroad retirement benefits even though that treatment may not have been the "best" way to attain the legislative goal); *Grauvogel* v. *Commissioner*, 768 F.2d 1087, 1088-1090 (9th Cir. 1985) (rejecting equal protection challenge to a tax exemption that applied to federal employees but not to "similarly situated" state employees); *Richards* v.

[10] In *United States* v. *Ptasynski*, 462 U.S. 74 (1983), the Court held that, even under the more rigorous analysis required under the Uniformity Clause of Article I, Section 8 of the Constitution (which generally requires that "an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found," *id.* at 84), Congress could properly exempt the production of crude oil from the North Slope of Alaska from the crude oil windfall profit tax that was imposed on the production of crude oil at all other locations within the United States. The Court concluded that, in light of the peculiar economic conditions attendant to oil production in northern Alaska, Congress could appropriately view oil from that region as an economic, not geographic, object of legislation. *Id.* at 85-86. The Court in *Ptasynski* did not address the equal protection challenge to that legislation that had been rejected in the district court in that case (*Ptasynski* v. *United States*, 550 F. Supp. 549, 555 (D. Wyo. 1982)).

Commissioner, 745 F.2d 524, 526 (8th Cir. 1984) (rejecting equal protection challenge to "favorable treatment" accorded to taxpayers who received pension benefits from a public, rather than private, system); *First National Bank* v. *United States*, 681 F.2d 534, 541 n.5 (8th Cir. 1982) (rejecting equal protection challenge to a benefit provided to bequests to church-owned cemeteries); *Barter* v. *United States*, 550 F.2d 1239, 1240 (7th Cir. 1977) (per curiam) (rejecting equal protection challenge to different tax rates for married couples and single individuals and stating that "perfect equality or absolute logical consistency between persons subject to the Internal Revenue Code [is not] a constitutional sine qua non").[11]

In the portion of the Internal Revenue Code that most closely relates to the subject of this case, Congress (like Iowa) has provided different tax rules for different types of gambling activities. For example, Section 4401 of the Code imposes a different rate of tax on revenues from legal and illegal gambling. See 26 U.S.C. 4401(a)(1) (tax of 0.25% on wagers authorized by state law); 26 U.S.C. 4401(a)(2) (tax of 2% on wagers not authorized by state law). Congress has also exempted

[11] We are aware of only one instance in which a classification in a federal tax law has been found to violate the Due Process Clause. In *Moritz* v. *Commissioner*, 469 F.2d 466 (10th Cir. 1972), the court held that 26 U.S.C. 214 (1954), which granted a deduction to women who have never married but not to similarly situated men, was subject to heightened scrutiny review and violated the Due Process Clause. Shortly after that decision was entered, that statute was repealed. Pub. L. No. 94-455, § 504, 90 Stat. 1563. We are not aware of any decision not later reversed on appeal that has held a federal tax classification invalid under the rational-basis standard of review. See 1 B. Bittker & L. Lokken, *Federal Taxation of Income, Estates, and Gifts* ¶ 1.2.5, at 1-28 (3d ed. 1999).

certain forms of gambling from taxation (26 U.S.C. 4402) and has exempted certain organizations from gambling taxes that other organizations that conduct identical gambling activity must pay (26 U.S.C. 4421(2)(B)). See also *Chickasaw Nation* v. *United States*, 534 U.S. 84 (2001). The assertion that the classifications contained in the federal gambling tax provisions deny equal protection to taxpayers has consistently been rejected by the courts. See *United States* v. *Hammes*, 3 F.3d 1081, 1082-1083 (7th Cir. 1993).

These statutory classifications fall well within the "especially broad latitude" of discretion that this Court has properly recognized as an indispensable feature in the formulation of a national tax policy. *Regan* v. *Taxation with Representation*, 461 U.S. at 547. The decision of the Iowa Supreme Court in this case, however, radically departs from these established principles. If adopted by this Court and applied to the federal government through the Fifth Amendment, the rationale applied by the Iowa court would produce extraordinary and unmanageable consequences. It would call into question the validity of numerous provisions in the Internal Revenue Code and would seriously impair the ability of Congress to formulate and implement flexible and sensible social, economic and tax policies in the future.

CONCLUSION

The judgment of the Supreme Court of Iowa should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

MICHAEL FITZGERALD,
Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA,
IOWA GREYHOUND ASSOCIATION,
DUBUQUE RACING ASSOCIATION, LTD.
and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Iowa

BRIEF OF THE CITY OF BETTENDORF, IOWA, THE CITY OF BURLINGTON, IOWA, THE CITY OF CLINTON, IOWA, THE CITY OF DAVENPORT, IOWA, THE CITY OF FORT MADISON, IOWA, THE CITY OF MARQUETTE, IOWA, AND THE CITY OF SIOUX CITY, IOWA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Cities of Bettendorf, Iowa, Burlington, Iowa, Clinton, Iowa, Davenport, Iowa, Fort Madison, Iowa, Marquette, Iowa and Sioux City, Iowa ("the Cities"), Amici Curiae,[1] have a special interest in supporting the Petitioner. First, the Cities depend on state revenue sharing, and the decision below wreaks havoc with the State's budget by mandating a tax refund exceeding $100 million and the loss of over $40 million in future annual tax revenues. Second, the Cities derive substantial direct and indirect revenues and economic benefits from the gambling excursion boats ("riverboat casinos") based in their communities. The Cities anticipate that the Iowa Legislature will be forced to increase taxes on riverboat casino gaming revenues if this Court does not reverse the decision below. The Cities are concerned that history may repeat itself, with their local riverboat casinos already operating in a highly competitive environment,[2] electing literally to sail away to lower-tax jurisdictions. Just over a decade ago, faced with uncompetitive business conditions, the owners of several of Iowa's riverboat casinos operating on the Mississippi River, including the Diamond Lady docked in Bettendorf and the Emerald Lady docked in Burlington and Fort Madison, Iowa, ceased operations and moved their vessels to the State of Mississippi to operate

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[1] Pursuant to Supreme Court Rules 37.4 and .6, no motion for leave to file this brief is required, as this brief is submitted on behalf of cities by their authorized law officers.

[2] Competing riverboat casinos operate in the bordering states of Illinois and Missouri. Land-based casinos also operate on Indian reservations in Iowa and within the bordering states of Minnesota and Wisconsin.

as dockside casinos. *See, e.g., City of Fort Madison, Iowa v. Emerald Lady*, 990 F.2d 1086, 1087 (8th Cir. 1993) (noting that "in a bid to attract tourists and stimulate local economies, Iowa legalized riverboat gambling;" describing the City's failed attempt to arrest the departing riverboat after its owner invoked a "financial infeasibility" clause to escape its lease). Iowa statutory amendments enacted in response to the departure of the first wave of riverboats led to the revival of that peripatetic industry, to the benefit of Iowa's river communities.

Cities where riverboat casinos are docked receive one-half of one percent of the adjusted gross receipts, with another one-half of one percent remitted to the county. Iowa Code § 99F.11(1) (2001). The Cities also receive admission fees paid on a per passenger, per excursion basis. *Id.* § 99F.10(3). Davenport and Bettendorf have each received over $12 million in direct gaming tax revenue with an additional $10.2 million remitted to Scott County (where both Cities are located) since 1991. Significantly, riverboat casino licensees partner with non-profit entities which distribute gaming proceeds to local charities, schools and community organizations. *Id.* §§ 99F.1(14) and 99F.6(4)(a). Over $52 million has been distributed in Scott County alone to over 440 educational institutions, non-profit organizations and community groups since 1991. Moreover, the riverboat casinos based in Davenport and Bettendorf collectively employ over 1,500 persons with a total payroll exceeding $400 million since 1991.[3] The river

[3] Scott County's population in the 2000 census was 158,668. Since 1999, the Catfish Bend Casino, which operates in both Burlington and Fort Madison, Iowa, has collectively paid nearly $900,000 in taxes to

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communities naturally enjoy the ripple effects from that economic spending and from the influx of tourist dollars. Tourist spending in turn increases local option sales tax revenues. These mobile gaming operations also have sparked land-based development, increasing local employment and property tax revenues. Accordingly, the Cities have a great stake in the vitality and continued existence of the riverboat casino industry and, therefore, add their voices to the chorus calling for reversal of the decision below.

the cities of Burlington and Fort Madison and counties of Lee and Des Moines, with populations of 38,052 and 42,351 respectively. Charitable contributions of over $3 million have been made to local schools, charities and community organizations there. The Catfish Bend Casino employs nearly 350 people, with a payroll since 1999 exceeding $26.5 million. The Mississippi Belle II Casino, located in Clinton, Iowa, similarly has paid over $800,000 in taxes collectively to the city of Clinton and county of Clinton, population 50,149. Over $2.7 million in charitable contributions have been made to local charities, community organizations and schools, and the Mississippi Belle II currently employs nearly 375, with a payroll since 1999 exceeding $22.1 million. The Isle of Capri Casino–Marquette, located in Marquette, Iowa, has paid over $1 million collectively to the city of Marquette and county of Clayton, population 18,678. The Marquette Isle of Capri has contributed over $1 million to local schools, charities and community organizations, and currently employs over 500, with a payroll exceeding $37.7 million since 1999. Finally, the Belle of Sioux City, located in Sioux City, Iowa, has paid over $1 million in taxes collectively to the city of Sioux City and county of Woodbury, population 103,877. The Belle of Sioux City has made over $2.7 million in contributions to local charities, community organizations and schools since 1999. In addition, the Belle of Sioux City employs nearly 375, with a payroll exceeding $29.8 million since 1999.

SUMMARY OF ARGUMENT

The issue is whether the Equal Protection Clause permits the State of Iowa to tax the revenue from all casino games, including slot machines, on floating riverboats at a rate lower than that imposed on slot machines at land-based racetracks. In a nutshell, this comparison of slot machine revenue at racetracks to all gaming revenue at floating riverboat casinos compares apples to oranges. For the reasons that follow, this Court should reverse the decision of the Iowa Supreme Court in *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d 555 (2002), *cert. granted*, 123 S. Ct. 963 (Jan. 17, 2003) (No. 02-695), by holding that the narrow majority erred in its equal protection analysis and subsequent finding of an Equal Protection Clause violation.

First, the majority decision conflicts with this Court's precedent mandating "rational basis" review of equal protection challenges to tax statutes. Because no fundamental right or suspect class is at issue, the legislature must be given broad leeway in determining the classes affected by tax legislation. *Nordlinger v. Hahn,* 505 U.S. 1, 11 (1992) (citing *Williams v. Vermont,* 472 U.S. 14, 22 (1985)). The challenger has the burden of disproving the legitimacy of a classification, and must negate every conceivable basis for the legislation. *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). When, as here, the classification is rationally related to a legitimate state end, the legislation is constitutional. *Id.* The Iowa legislature taxed casino games on riverboats and slot machines at racetracks at different rates for multiple legitimate reasons. The Iowa Supreme Court essentially ignored the analysis set forth by this Court, and redrafted a new analysis for equal protection challenges.

Second, the decision below opens the floodgates to equal protection challenges to numerous other tax statutes. Such challenges threaten the operating budgets of state and municipal governments.

Third, this Court may correct a state court ruling misconstruing the federal constitution when, as here, there is no adequate and independent state law ground for the judgment below. *Michigan v. Long,* 463 U.S. 1032, 1040 (1983). The Iowa Supreme Court applies the same analysis in reviewing equal protection claims under the Iowa constitution as is applicable under the federal constitution. Accordingly, reversal of its erroneous federal ruling necessarily reverses the judgment below.

ARGUMENT

I. The Majority Opinion Is in Direct Conflict with this Court's Precedent.

In the area of "economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a reasonable basis for the classification.*" *Beach Communications,* 508 U.S. at 313 (emphasis added). The state has no obligation to produce evidence which sustains the rationality of a classification. *Heller v. Doe,* 509 U.S. 312, 319 (1993). So long as a "plausible reason" exists for the congressional action, no further inquiry should occur. *Beach Communications,* 508 U.S. at 313-14. Further, classifications which do not involve a suspect class or fundamental right are afforded a strong presumption of validity. *Heller,* 509 U.S.

at 319. Thus, a classification will "not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequity." *Id.* at 321. The court is compelled to accept the generalizations of the legislature even if the fit between the means and ends is inaccurate. *Id.*

Respondents' burden was to negate "every conceivable basis which may support 'the legislative reason for the enactment.'" *Beach Communications,* 508 U.S. at 315. In cases alleging discriminatory taxation, a presumption of constitutionality exists "which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.'" *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973) (quoting *Madden v. Kentucky,* 309 U.S. 83, 88 (1940)). Here, Petitioner advanced several reasonable bases for the differential tax, and the district court agreed that Respondents failed "to negate every conceivable basis for upholding the taxing statute." Pet. App. at 32-34. The district court identified three rational bases the legislature may have had in granting a lower tax rate, including: (1) promotion of economic development in towns bordering the river; (2) development of new riverboats and preservation of Iowa's riverboat heritage; and (3) promotion of a useful or beneficial industry within the state. *Id.* at 34.

A. Flaws in the Majority's Analysis.

The majority seized on one of many possible purposes for the legislation–"to help the racetracks recover from economic distress"–and concluded the state flunked the rational basis test because the higher tax rate hurt the

racetracks financially in subsequent years. *Racing Ass'n,* 648 N.W.2d at 560. The majority erred by ignoring the fact that the racetracks were better off with some slot revenue, albeit heavily taxed, than without any slot revenue at all, and further erred by ignoring other conceivable purposes for the differing tax rates. By authorizing a new source of revenue for racetracks, the legislature recognized that the benefit of slot revenue outweighed the increase in taxation. In essence, the majority substituted its policy judgment for that of the legislature. Such a substitution violates rational basis review. *See Hodel v. Indiana,* 452 U.S. 314, 331, 333 (1981) (noting that in substituting its policy judgment for that of the legislature, the court acted as a superlegislature and improperly passed "on the wisdom of congressional policy determinations").

The Iowa Supreme Court majority not only performed independent factfinding that amounted to a substitution of its judgment for that of the legislature's, but improperly considered how post-enactment economic events purportedly contradicted the alleged legislative purpose. *Racing Ass'n,* 648 N.W.2d at 561. The purpose of rational basis review is to determine whether a reason for the differential tax treatment is plausible *at the time the statute was enacted*, not whether such a legislative purpose remains valid years later. The legislature is not a soothsayer, and it is inappropriate for the court to review a statute using hindsight. The Iowa court's majority essentially concocted a "back to the future" test in which it second-guessed legislative policy choices in light of subsequent events. This standard is unworkable and subjects a broad array of statutes to equal protection challenge.

At the time the statute was enacted, a rational legislator could have found a number of valid reasons to tax

riverboat casino and racetrack slot revenue differently. The majority below disregarded the admonitions of this Court in *Beach Communications*:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of "legislative facts" explaining the distinction "[o]n the record," has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and ability to function."

508 U.S. at 315 (quoted citations omitted).

The dissent below correctly recognized several valid reasons the legislature could have had for taxing gaming revenue from riverboat casinos at a different rate than the land-based racetracks:

> Riverboats are not the same as racetracks. From an entertainment perspective, they speak to different cultural traditions–river lore versus agriculture. The majority questions these distinctions once gaming is attached to the enterprise. But there is no constitutional impediment to a legislature favoring diversity in cultural attractions for its citizens and tourists. And, rightly or wrongly, a legislative majority could rationally determine that a riverboat casino holds more romantic tourist appeal than a casino stuck in a dog track.
>
> To advance these policy decisions, a reasonable legislature would also want to recognize a very pragmatic distinction between the two gambling venues: riverboats are mobile, racetracks are not. If the economic climate turns unfavorable here, a riverboat merely unties its lines and sails elsewhere. So it is not unreasonable for the legislature to create economic incentives to develop or retain riverboat gambling while maintaining the status quo with respect to other forms of the sport.

Racing Ass'n, 648 N.W.2d at 563 (Neuman, J., dissenting). Legislators also could have chosen to favor riverboat casinos offering table games, as well as slots, over land-based slot machine parlors because the riverboats draw a larger number of tourists from border states. In addition, rational legislators could have considered the fact that floating riverboat casinos have significantly higher operating costs than land-based racetracks.[4]

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[4] Floating riverboat casinos are subject to extensive government regulation, beyond those governing land-based racetracks, including additional equipment requirements, such as availability and maintenance of personal flotation devices, visual distress signals, markings and ventilation equipment; increased documentation and certification and inspection of equipment, hull, boilers and machinery; and increased manning requirements including a master (captain), mates, pilots, engineers, radio and staff officers, and seamen. *See generally*, 33 C.F.R. § 175.1 et seq. (2000) (equipment requirements); 46 C.F.R. § 15.101 et seq. (1999) (crew manning requirements); 46 C.F.R. § 67.1 et seq. (1999) (documentation of vessel requirements); 46 C.F.R. § 71.01 et seq. (1999) (inspection and certification requirements). In addition to these federally mandated requirements, floating casinos incur additional

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Here, the majority speculated to find a single "irrational" purpose for the legislation, then disregarded all remaining conceivable bases, ignoring the well-settled principle that legislation may have more than one rational purpose.[5] *See DeLeon-Reynoso v. Ashcroft,* 293 F.3d 633, 640-41 (3d Cir. 2002) (discussing five independent rational bases for classification when only one basis would be sufficient to uphold the statute); *Turner v. Glickman,* 207 F.3d 419, 425 (7th Cir. 2000) (addressing three rational bases for the enactment of the statute).

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practical operational costs associated with fuel consumption, higher insurance rates due to the risk of sinking, and increased legal costs associated with compliance with the laws of multiple jurisdictions. *See, e.g., Frederick v. Harvey's Iowa Mgmt. Co.*, 177 F. Supp. 2d 933, 936-37 (S.D. Iowa 2001) (reviewing conflicting rulings by federal courts and Iowa Workers' Compensation Commissioner on question of whether injury claims of riverboat casino employees are governed by Jones Act or Iowa Workers' Compensation Act).

[5] This Court has previously determined the legislature has wide latitude in crafting legislation. Specifically,

> [a] state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

Lehnhausen, 410 U.S. at 364-65 (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937)).

The Respondents also relied heavily on the alleged motives of a single legislator to infer improper motivation for the tax. Brief in Opposition to Petition for Writ of Certiorari at 6.[6] However, not only did the single legislator's alleged motive involve the enactment of a different statute, but use of the words or actions of a single legislator to infer statutory purpose is improper.[7] Instead, it is reasonable to assume that different legislators had different motivations–that is simply democracy at work–as elected members of the Iowa House and Senate balance competing interests and strike compromises in enacting legislation. In *Iowa State Education Association–Iowa Higher Education Association v. Public Employment Relations Board,* 269 N.W.2d 447, 448 (Iowa 1978), the Court observed:

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[6] *See also Racing Ass'n*, 648 N.W.2d at 557 n.2 ("A state representative from a riverboat county offered the original proposed amendment, H-5391 which proposed a forty percent gross-receipts tax on gambling games at racetracks. There was no stated reason for imposing the higher rate on racetracks.").

[7] *See Bread Political Action Comm'n v. Fed. Election Comm'n*, 455 U.S. 577, 581 n.3 (1982) (refusing to give weight to affidavit of senator regarding the meaning of statutory language); *Lindland v. U.S. Wrestling Ass'n*, 227 F.3d 1000, 1008 (7th Cir. 2000) (stating "Legislative history is a chancy subject; subsequent legislative history is weaker still.") (citing *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988) and *Weinberger Reg. Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974)); *Donnelly v. Bd. of Trs. of Fire Ret. Sys.*, 403 N.W.2d 768, 771 (Iowa 1987) (stating "We must look at what the legislature said, rather than what it should or might have said. . . . [W]e will not consider a legislator's own interpretation of the language or purpose of a statute. . . . "); *Ruthven Consol. Sch. Dist. v. Emmetsburg Cmty. Sch. Dist.*, 382 N.W.2d 136, 138 (Iowa 1986) (stating "we will not consider a legislator's private interpretation of a statute, even if the legislator was actively involved in drafting and enacting the legislation.").

> The legislative process is a complex one. A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. What impelled another legislator to vote for the wording is apt to be unfathomable.[8]

B. Legitimate Grounds Exist to Differentiate Racetracks and Riverboats.

The Fourteenth Amendment does not prohibit legislation merely because it differentiates among types of businesses or is limited in its application to particular geographical or political subdivisions of the state. Rather, the Equal Protection Clause is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the State's objective." *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 70-71 (1978) (citation omitted). The majority concluded that the goal of raising revenue "is not rationally served by a taxing scheme that discriminates against certain slot machines simply because of their geography." *Racing Ass'n,* 648 N.W.2d at 562.[9] However, this conclusion conflicts with this Court's

[8] It has long been said "the making of laws is like the making of sausages–the less you know about the process the more you respect the result." Frank W. Tracey, *The Report of the Committee on Uniform Laws of the American Bankers' Association*, 15 Banking L.J. 542, 542 (1898); *see generally In re Graham*, 104 So. 2d 16, 18 (Fla. 1958).

[9] Contrary to the majority's conclusion, the classification at hand is rationally related to increasing state revenue. If the racetracks can bear the higher rate, and so far they have been able to, the higher rate increases the amount of money paid to the State in taxes by the

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precedent. The differential tax rate serves multiple rational purposes, including the economic development of river communities, promotion of Iowa riverboat heritage, and helping Iowa riverboat casinos compete with casinos in neighboring states. Respondents failed to present sufficient evidence to prove that the tax differential "rests on grounds wholly irrelevant to the achievement" of the above objectives. *Holt,* 439 U.S. at 471 (citation omitted).

Moreover, geography indeed can play a role in determining the economic or fiscal status of a person or organization to permit differing tax rates. *See Hodel,* 452 U.S. at 333 (holding legislation providing different coal mining restrictions based on geographic location did not violate equal protection clause; "[a] claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact"); *Holt,* 439 U.S. at 70-71 (stating that the Equal Protection Clause does not prohibit legislation merely because it limits its application to a particular geographical region of a state).

Here, the majority erred by holding the same activity performed by different classes of business cannot be taxed at different rates. It is a fundamental rule of equal protection law that statutes which permit or prohibit specific acts in a geographical area do not violate the Equal Protection Clause merely because the application is not equal among regions. 16B Am. Jur. 2d *Constitutional Law*

racetracks. Similarly, if the riverboats had sailed to states with more favorable tax rates, a higher tax rate would have resulted in no revenue from the riverboats. Therefore, the legislature rationally could have believed that this tax structure maximized revenue from both the riverboats and the racetracks.

§ 844, at 396 (1998). The mere fact that a statute differentiates among the same class located in different geographical regions is permissible so long as some reasonably conceivable basis for the distinction exists. *Id.* at 397. This Court has duly noted that "where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen,* 410 U.S. at 358.

In addition to the ability of the legislature to vary the rates of taxation based on geographic location or nature of the business, the overall discretion of a state to lay taxes is wide. *Id.* at 526. In fact, the Equal Protection Clause "imposes no iron rule of equality," nor does it prohibit the "flexibility and variety that are appropriate to reasonable schemes of state taxation." *Id.* (quoting *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526-27 (1959)). In *Lehnhausen*, this Court upheld an Illinois taxing statute which imposed a higher tax on property owned by corporations than that same property owned by individuals. In reversing the Illinois Supreme Court, this Court quoted Justice Holmes' dissenting opinion in *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389, 403 (1928):

> If usually there is an important difference of degree between the business done by corporations and that done by individuals, I see no reason why the larger business may not be taxed and the small one disregarded, and I think it would be immaterial if here and there exceptions were found to the general rule. . . . Furthermore, if the State desired to discourage this form of activity in corporate form and express its desire by a special tax, I think that there is nothing in the Fourteenth Amendment to prevent it.

Lehnhausen, 410 U.S. at 361 (quoting *Quaker City Cab,* 277 U.S. at 403 (Holmes, J., dissenting)). Further, in *Lehnhausen*, this Court quoted at length *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911), in which the Court stated:

> It could not be said . . . that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. . . . It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals.

Lehnhausen, 410 U.S. at 361-62 (quoting *Flint,* 220 U.S. at 161-62). Thus, this Court has long recognized that states can tax at different rates revenue from the same service provided by different classes of businesses. The majority opinion below erred in holding that the state tax scheme violated the Equal Protection Clause by levying a higher rate on land-based casinos than that levied on riverboat casinos floating on the state's border rivers.

The majority opinion is strikingly out of step with federal Equal Protection jurisprudence and cries out for reversal.

II. The Majority Decision Opens Numerous Tax Laws to Equal Protection Challenge.

This Court has traditionally given considerable deference to the States in designing their tax systems. *Lehnhausen,* 410 U.S. at 359. This deference comes from recognition of the authority of State legislatures to consider numerous factors in setting taxes, including economic incentives to promote or discourage certain types of activities, incentives to encourage development, and other economic, historic, social and geographic factors. Flexibility and variety, as a result of the above factors, are necessary components to create a reasonable scheme of state taxation. *Id.* (citing *Allied Stores,* 358 U.S. at 526-27). This Court has specifically recognized that, because of these various factors, legislatures can set different tax rates for revenues derived from the same types of services provided by different classes of taxpayers. *Id.* at 358.

The decision of the Iowa Supreme Court turns this tradition on its head. By holding that tax rates on slot machines at land-based racetracks must be the same as tax rates on all gaming operations, including slot machines, at floating riverboat casinos, the Iowa Supreme Court has disregarded or misapprehended longstanding precedent. To affirm the majority decision would essentially nullify *Lehnhausen* and require legislatures to tax equally all businesses offering a particular service regardless of any independent economic, historic, social, or geographic considerations. The result: endless litigation over legislative line-drawing in tax statutes.

Litigation has already been filed in *Coalition for a Common Cents Solution v. Iowa,* No. EQCV26737 (Iowa Dist. Ct. October 8, 2002) (Pet. App. at 71-76), challenging

on equal protection grounds, the constitutionality of Iowa Code Chapter 422E, a local option sales tax. The district court cited the majority opinion in this case in denying a motion to dismiss. *Id.* at 75. Such litigation undermines the ability of Iowa municipalities to tax citizens for improvements to local educational facilities. The *Coalition* lawsuit is only the first of many anticipated challenges to differential tax rates on the basis of the majority opinion in this case.

The decision below opens numerous other statutes to challenge. For example, the following Iowa statutes could face equal protection challenges under the Iowa Supreme Court's new analysis. *See* Iowa Code §§ 422.5(j)(2) (providing the benefit of apportionment to the taxable income of resident shareholders of S Corporations, but not partners, shareholders or members of partnerships, C Corporations or limited liability companies); 422.45(21) (providing an exemption from the tax imposed on the sale of tangible personal property for "printers" engaged in the sale of certain printing materials, but no similar exemption for other businesses selling the same printing materials); 422.45(27) (providing an exemption on the gross receipts from the sale of "computers used in the processing or storage of data or information by an insurance company, financial institution, or commercial enterprise," but not for computers used for processing or the storage of data by a profession, occupation or nonprofit organization); H.F. 2622, 79th Gen. Assem., Reg. Sess. (Iowa 2002) (providing for the abatement of "unpaid sales and use taxes and local sales and services taxes owed by any foundry located in Lee or Jefferson county on the purchase of tangible personal property used by the foundry in making patterns, molds, or dies which purchases occurred between July 1,

1997" and May 6, 2002, without abating taxes on foundries located in other counties).

This litigation quagmire should be averted by this Court's reversal of the decision below. The potential ramifications from this case are not confined to Iowa. If the decision of the Iowa Supreme Court is allowed to stand as a valid interpretation of the Equal Protection Clause, it will support similar challenges to other state and federal tax schemes. As this Court's precedent has made clear, the line-drawing in these tax schemes should be performed by legislatures who are free to consider any legitimate state interests, not courts, and therefore, the Iowa court's decision in this case must be corrected.

III. No Adequate and Independent State Ground Supports the Majority's Decision.

There is no impediment to this Court reversing the Iowa Supreme Court's decision, even though that decision considered, in part, the Iowa Constitution. This Court may reverse a state supreme court decision on federal law when no adequate and independent state ground exists for the holding below. *Michigan v. Long,* 463 U.S. 1032, 1040 (1983). This Court will assume "there are no independent state grounds when it is not clear from the opinion itself that the state court relied on an adequate and independent state ground and when it fairly appears the state court rested its decision primarily on federal law." *See id.* at 1042 (concluding that references to state constitution did not constitute independent state ground for that decision).

Equally important to the determination of whether an independent and adequate state ground exists is the examination of whether the state court decision appears to

rest on primarily federal law or to be interwoven with federal law. *Illinois v. Rodriguez,* 497 U.S. 177, 182 (1990) (citing *Long,* 463 U.S. at 1040, 1042). Under these circumstances, this Court requires that the state decision "contain a '"plain statement" that [it] rests upon adequate and independent state grounds,' otherwise, '[it] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.'" *Id.* (quoting *Long,* 463 U.S. at 1041). Like *Rodriguez,* the Iowa Supreme Court's decision in *Racing Association,* did not contain a plain statement that the decision rested on state law.

In *Arizona v. Evans,* 514 U.S. 1, 10 (1995), this Court found that no jurisdictional hurdle was present when the state court decision rested "squarely on the interpretation of federal law," and the court failed to state the "references to federal law were 'being used only for the purpose of guidance, and d[id] not themselves compel the result [it] reached.'" *Id.* (quoting *Long,* 463 U.S. at 10:41). In *Pennsylvania v. Libran,* 518 U.S. 938, 941 (1996), this Court found independent and adequate state grounds to be lacking where the state court failed to specifically note that in the context of search and seizure law, no state "automobile exception" exists. Thus, because the law of the commonwealth appeared "interwoven with federal law," the "adequacy and independence of any possible state law ground [was] not clear from the face of the opinion," and jurisdiction was not precluded. *Id.*

Here, no adequate and independent state ground exists to support the decision below. The Iowa Supreme Court has repeatedly held that the Iowa and federal equal protection clauses are deemed "to be identical in scope, import and purpose." *Bowers v. Polk County Bd. of Supervisors,* 638

N.W.2d 682, 689 (Iowa 2002); *Exira Cmty. Sch. Dist. v. Iowa,* 512 N.W.2d 787, 792 (Iowa 1994). Further, Iowa's high court applies the "same analysis" to state equal protection claims as is applied in federal cases. *Johnson v. Lewis*, 654 N.W.2d 886, 890 (Iowa 2002); *Master Builders of Iowa, Inc. v Polk County,* 653 N.W.2d 382, 398 (Iowa 2002); *Bowers,* 638 N.W.2d at 689; *Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Prods., Inc.,* 522 N.W.2d 607, 614 (Iowa 1994); *Bruns v. Iowa,* 503 N.W.2d 607, 609 (Iowa 1993); *Rudolph v. Iowa Methodist Med. Ctr.,* 293 N.W.2d 550, 557 (Iowa 1980). Indeed, as the decision below reiterated, "Iowa courts are to 'apply the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim.'" *Racing Ass'n,* 648 N.W.2d at 558 (quoting *In re Morrow,* 616 N.W.2d 544, 547 (Iowa 2000)). Every Iowa equal protection case cited in the decision below reached the same conclusion and rested on its interpretation of federal law.[10]

To make a separate state law interpretation, the court must make its intention clear. *Rodriguez,* 497 U.S. at 182. On those rare occasions the Iowa Supreme Court has elected to diverge from federal precedent in construing the Iowa Constitution, it has gone to great lengths to explain

[10] *See Bowers*, 638 N.W.2d at 689 (holding the same analysis applies to federal and state equal protection claims); *Morrow*, 616 N.W.2d at 547 (Iowa 2000) (same); *Federal Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 156 (Iowa 1988) (same); *Bierkamp v. Rogers*, 293 N.W.2d 577, 580 (Iowa 1980) (noting the standard for equal protection review stems from federal law); *Gleason v. City of Davenport*, 275 N.W.2d 431, 435 (Iowa 1979) (stating an unreasonable classification which lacks a reasonable relationship to a legitimate state interest violates both state and federal constitutions).

why. *See Bierkamp v. Rogers,* 293 N.W.2d 577, 579 (Iowa 1980). Strikingly absent from the majority's opinion here, is any confirmation that a "separate analysis" would apply to taxation of these racetracks. Although the majority cites *Bierkamp*, its reference is to a general proposition of equal protection law, not to the proposition that the Iowa Court *may* interpret the state constitution differently than the federal constitution. The language of *Bierkamp* does not in any way preclude the Iowa Supreme Court from interpreting both state and federal equal protection issues in the same manner. Thus, the majority's decision essentially was guided by decisions of this Court. *See Oregon v. Kennedy,* 456 U.S. 667, 671 (1982) (noting that with only one exception, the cases cited by the Oregon Court rested on an interpretation of federal law; the cases cited outline that the general rule of the case clearly rested upon and were guided by federal law.) The fact the majority relied heavily upon federal grounds enables this Court to review and reverse the decision below. *Id.*

This Court has not hesitated to reverse a state supreme court decision expressly based on both federal and state equal protection grounds when, as here, the state's high court applies the same analysis in construing the state constitution and has misinterpreted federal precedent. In *American Ass'n of University Professors v. Central State University,* 699 N.E.2d 463 (Ohio 1998), the Ohio Supreme Court held that a state statute violated the equal protection clauses of *both* the state and federal constitutions, *id.* at 470, just as the Iowa Supreme Court did in the case at bar. The Ohio Supreme Court, just like Iowa's high court, applies the same analysis in determining whether a statute allegedly offending federal equal protection standards also violates the state constitution. *Id.* at 467 (stating

"These two provisions are functionally equivalent, and the standards for determining violations of equal protection are essentially the same under state and federal law.") Likewise, the dissenting justices of the Ohio Court, like the dissenting justices of the Iowa Court, made it clear that the methodology and conclusion reached by the majority conflicted with federal standards for rational basis review of equal protection challenges. *Id.* at 471-72. This Court, concluding that the Ohio Supreme Court had misinterpreted federal law, reversed *per curiam* on the ground that the Ohio Court's holding cannot be reconciled with the requirements of the Equal Protection Clause. *Cent. State Univ. v. Am. Ass'n of Univ. Professors,* 526 U.S. 124 (1999). Just as this Court found no independent state ground precluding reversal in that case, it should find no independent and adequate state law removes jurisdiction in this case, and it should reverse the Iowa Supreme Court's decision.

CONCLUSION

For the foregoing reasons, the decision of the Iowa Supreme Court should be reversed.

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CLERK

No. 02-695

In the
SUPREME COURT OF THE UNITED STATES

MICHAEL FITZGERALD,
Treasurer of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA,

Respondent.

BRIEF *AMICI CURIAE* OF THE STATES OF MISSOURI, ALABAMA, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW MEXICO, SOUTH DAKOTA, TENNESSEE, VERMONT, COMMONWEALTH OF PUERTO RICO

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QUESTION PRESENTED

Can a state tax revenue at different rates, when that revenue is derived from similar activities by distinct segments of an industry at different types of locations, without violating the Equal Protection Clause?

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No. 02-695

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In Support of Petitioner

INTEREST OF AMICUS CURIAE

The amici are the attorneys general of their respective states and commonwealths, responsible for defending legislative enactments – including laws raising revenue – and the actions of state officials – including the collection of taxes. Their interest in ensuring that legislatures have the ability to allocate the burdens of government without undue interference is heightened, at this time, by the financial conditions of many states. The National Governor's Association recently reported:

> Nearly every state is in fiscal crisis. Amid a slowing growing national economy, state revenues have shrunk at the same time that spending pressures are mounting–particularly for Medicaid and other healthcare–creating massive budget shortfalls.[1]

In that environment, legislatures need the maximum flexibility constitutionally allowed to tailor not just the expenditure of funds, but the methods of raising funds. Tax rates and revenues and economic success are closely tied. Success in a particular area or a particular industry enables higher taxes there to raise additional revenue. Lack of success in a particular area or a particular industry lowers revenue. Lower taxes for a particular area or a particular industry may, by reducing costs, enhance economic success – leading, in turn, to higher revenues.

The Iowa Supreme Court's holding threatens the States' ability to work effectively in today's difficult economic world. The holding threatens the state legislatures' ability to promote economic development in an orderly fashion – *i.e.*, free of undue second-guessing from the courts. And that threat extends not just to the setting of tax rates up front, the particular matter at issue here, but to the use of tax credits – means by which legislatures retroactively reduce effective tax rates, often for selected categories of businesses. The Iowa Supreme Court's decision, if affirmed, will permit courts to replace legislatures as the experts on these and related questions of taxation and economic development.

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[1] THE FISCAL SURVEY OF THE STATES (National Governors Association, November 2002) at viii (available on Feb. 4, 2003, at http://www.nga.org).

SUMMARY OF ARGUMENT

"The tax system in the United States is a major vehicle of social and economic policy."[2] This case tests the authority of the courts, invoking the Constitution of the United States, to second-guess the legislative development of tax systems that are, in fact, vehicles of economic policy. Specifically, it addresses tax systems that raise revenue in a manner that targets benefits to geographic areas that are seeing little economic success.

The Iowa court belittles geographic differentiation. It does so in the context of a tax that sets one tax rate for an activity when it is undertaken by one segment of an industry, and another, higher rate for similar activities undertaken by another segment of perhaps the same industry. Those segments, largely as a result of state regulation, are distinguished by geographic location. If endorsed by this Court, the Iowa court's refusal to defer to legislative reliance on geographic distinctions would threaten elements of the tax systems other than differential rates. States also have entire taxes that apply – or, at local option, are available to be applied – only to specific geographic areas. And they have created tax credit schemes available only to businesses that operate in carefully defined geographic areas.

The courts do not have the economic expertise to second-guess such legislative determinations. And until the Iowa court's decision, the courts stayed out of such debates. This court should rein in the constitutional doctrine advocated by the Iowa court and retain for the legislative branch the ability

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[2] Leo P. Martinez, *Of Fairness and Might: The Limits of Sovereign Power to Tax After Winstar*, 28 ARIZ. ST. L. J. 1193, 1200 (Winter 1996).

to effectively tailor tax policy to address economic inequities within the States.

ARGUMENT

I. Uneven economic development and economic opportunity require that legislatures differentiate among industries and locations.

In no state is economic success uniform in all areas. Rather, the ebb and flow of the economy benefits some areas while leaving others behind. "Dating back to colonial times, some industries have been favored over others and some areas have grown faster than others."[3] The "pattern of industrial and geographical development has changed significantly over time."[4] Geographically, urban areas may have the strongest economies for a time, but that distinction may then pass temporarily to smaller towns or some rural areas.[5] Some areas, however, seem to have persistent economic problems.[6]

State legislatures have various tools for targeting assistance to the areas and industries in greatest need. Those seeking to help disadvantaged areas point legislators to the

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[3] Robert. Q. Hanham & Alison Chisholm Hanham, *The Uneven Development of Manufacturing in the Southeast, 1950-1990*, 41 SOUTHEASTERN GEOGRAPHER 1 (May 2001).

[4] *Id.*

[5] *Id.* at 11.

[6] *See, e.g.*, Thomas A. Lyson & William W. Felk, FORGOTTEN PLACES: UNEVEN DEVELOPMENT IN RURAL AMERICA (U. Press of Kansas, 1993).

obvious connection between government fiscal policies and localized development. For example, the Center for Public Policy Priorities, looking at economic development and state economic policies – including tax policies – in Texas concluded:

> The uneven economic health of communities across Texas is important in examining public economic development activities. Federal, state, and local governments directly and indirectly influence the economic development of communities through programs and tax expenditures. As long as a significant share of the state's communities lack the resources to participate fully in an expanding economy, the continued use of public resources for economic development is legitimate and needed.[7]

Though grants and other expenditures are the most obvious means of making "public resources [available] for economic development," tax policies also result in the movement of "public resources" into targeted areas.

Iowa chose to enhance economic development by permitting certain kinds of gambling. In the case of casino gambling, Iowa permitted it only in a targeted area, *i.e.*, in river towns where there was an economic need. By bringing back an image of the golden era of river travel, Iowa sought to enhance the river regions' attractiveness to tourists. Iowa also permitted betting at horse and dog tracks. Then, when the tracks fell on hard economic times, Iowa allowed them to add slot machine gambling.

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[7] "Texas Economic Development Incentives: for the Common Good?" (Feb. 11, 2000), available February 14, 2003, at http://www.cppp.org/products/policypages.

The Iowa legislature, in determining how to tax those different segments of the gambling industry, permitted to operate only in certain geographic areas, made economic choices. It told the tracks that although they could offer slot machines, it was not going to treat all of that revenue as if the tracks were casinos. The Iowa legislature thus used tax policy to protect its efforts to enhance economic development along the rivers from a threat that might be posed by slot machine gambling at the tracks.

II. Legislatures commonly make distinctions based on geography as they seek to promote and preserve economic development.

In this particular instance, Iowa has established two taxes, reaching similar activities, but in two distinct segments of what may be the same industry, segments that are permitted to operate only in two different types of locations. In judicially modifying the higher of the two taxes, the Iowa Supreme Court derogated the State's ability to differentiate geographically when establishing taxes. But geographical distinctions are common – and, indeed essential. They recognize the economic differentials discussed above.

Those differentials affect the setting of tax rates in two respects. Industries in areas that are well-off are better able to bear the burdens of taxation. And lower taxes give industries an incentive to locate in disadvantaged areas. Legislatures seeking to fund government services will thus adopt taxes and tax rates that raise more revenue from wealthy than from poor areas. And they will adopt taxes and tax rates that give benefits to those who locate, relocate, or expand in poor areas. Their ability to do so would be threatened by a decision affirming the holding of the Iowa Supreme Court.

A. Special taxes may be imposed by a state only on those in a particular geographic area.

Iowa's distinction between boats operating in river towns and tracks located elsewhere is only one example of the myriad ways in which states differentiate geographically when establishing tax schemes.

State taxes may apply only to particular counties. For example, Utah permits only rural counties to impose a tax up to 1% to fund rural county health care facilities and rural hospitals.[8] Alabama has a transient occupancy tax of 5% for counties located in the Alabama mountain lakes area, and 4% for all other counties.[9]

The geographic area need not be a county. Connecticut taxes the handle at dog tracks at 2%,[10] but taxes off track betting at 3.5%.[11] New York caps locally imposed taxes on admissions to harness or running races at 3%, but only if the regional corporation has an off-track betting facility.[12] In Utah, resort communities may impose an additional fixed percentage sales tax.[13] And at least half of the states have enacted a variety of

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[8] UTAH CODE ANN. §59-12-802 (2003).

[9] ALA. CODE, §40-26-1 (2002).

[10] CONN. GEN. STAT. §12-575(e) (2002).

[11] *Id.* §12-575(g).

[12] NY CLS RACING & WAGERING §531 (2002).

[13] UTAH CODE ANN. §59-12-401 (2003).

tax statutes that are simply based on the population of geographically defined subdivisions.[14]

The states have also created thousands of independent public authorities and special districts. These local governments are entrusted with the power to provide basic public services, and authorized to pay for them by imposing local taxes, which they do at widely disparate rates.[15] An obvious example is schools. The States' provision of their respective educational systems is generally geographically based: States delegate much of the decision making authority to local school districts, and most states rely primarily on local property taxes for school funding.[16] But the local taxing authorities take a variety of other forms. Florida permits the formation of regional transportation authorities, which may be authorized by their voters to levy an ad valorem tax on the value of real property.[17] In Indiana, a certified technology park has authority to levy property taxes in the geographic area where the park is

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[14] Validity of Statutory Classifications Based on Population – Tax Statutes, 98 A.L.R.3d 1083 (1980)(table of jurisdictions represented).

[15] R. Biffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 19 (1990), and R. Biffault, Our Localism: Part II – Localism and Legal Theory, 90 COLUM. L. REV. 346, 375-378 (1990).

[16] Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 7-9 (Fall 2002).

[17] FLA. STAT. §163.570 (2002).

located.[18] And Washington authorizes the formation of multi-county hospital districts that have the power to levy taxes.[19]

Some – though not all – of these tax laws can be distinguished from the Iowa tax because the benefits flow to the area where the tax is imposed. But each law taxes similar activities at different rates, using the sort of geographic criteria the Iowa court disparages. The ability of legislatures to make such geographic distinctions would be inhibited, were the Iowa Supreme Court right in concluding that courts can easily second-guess them. And were the Iowa holding applied to declare existing, geographically-defined taxes unconstitutional and require refunds, the States' already gloomy financial picture would suddenly become even more bleak.

B. Tax credits available only in certain areas, such as "enterprise zones," modify tax rates for a particular geographic area.

States do not restrict their geographic differentials in taxation to different taxes or tax rates, such as those discussed above. They also use tax credits and other targeted incentives to "focus economic development policy on poorer areas."[20] Perhaps most universal are "enterprise zones." Such zones have recently "become a central pillar of many states' economic

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[18] IND. CODE ANN. §36-7-32-15 (2002).

[19] WASH. REV. CODE § 70.44.060 (2002).

[20] Alan H. Peters & Peter S. Fisher, "The Effectiveness of Enterprise Zones," Employment Research – October 2002, W.E. Upjohn Institute for Employment Research, available Feb. 14, 2003 at http://www.upjohninst.org/publications/.

development effort."[21] "[E]nterprise zone programs consist mainly of tax instruments: property tax abatements, sales tax exemptions, and income tax deductions, credits, and exemptions for employment creation, capital investment, or income creation in the zones."[22]

Thus, for businesses that operate – and only to the extent they operate – within specified areas, Alabama, for example, authorizes local governments to set up enterprise zones, with a "reduction of municipal tax rates, municipal license rates and/or municipal fees for governmental services within such zones."[23] Arizona allows income tax credits.[24] Arkansas permits refunds of sales and use taxes.[25] California permits credits against sales or use taxes imposed on the purchase of property.[26] Kentucky allows exemptions for sales and use, motor vehicle usage, and

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[21] *Id.* Although here we discuss only state laws using tax incentives for economic development, there are federal equivalents. *See* Dept. of Housing & Urban Development, TAX INCENTIVE GUIDE FOR BUSINESSES IN THE RENEWAL COMMUNITIES, EMPOWERMENT ZONES, AND ENTERPRISE COMMUNITIES, FY 2001, available Feb. 14, 2003, at http://www.ezec.gov/.

[22] *Id.*

[23] ALA. CODE § 11-40-16(b)(1) (1975).

[24] ARIZ. REV. STAT. ANN. § 41-1525 (1992).

[25] ARK. CODE ANN. § 15-4-1704(a)(1) (Lexis-Nexis Supp. 2001).

[26] CAL. REV. & TAX. § 23612.2(a) (West Supp. 2003); CAL GOV'T §§ 7070 *et seq.* (West Supp. 2003).

corporate income taxes.[27] Maryland permits credits against property and income taxes.[28] Minnesota permits a reduction in sales, income, and property taxes.[29] Missouri permits a credit against income tax.[30] Ohio permits an exemption for property taxes.[31] Oregon permits exemptions to property taxes.[32] Utah permits credits towards income and corporate franchise taxes.[33] Even Iowa has such zones, allowing companies operating there a credit against their corporate income tax liability.[34] In each instance, again, the tax benefits are allowed only for those operating within the precise geographic limits of the designated zone.

States are now building on that concept, using geographically-specific credits to assist areas whose troubles are not defined solely in economic terms. A recent enactment shows the creativity this concept allows: Maryland now

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[27] KY. REV. STAT. ANN. §§ 154.45-090(2), (4)-(7) (Michie 1998).

[28] MD. ANN. CODE art. 83A, §§ 5-404(a)(1)-(2) (Lexis-Nexis Supp. 2002).

[29] MINN. STAT. § 469.171, subd. 1(1)-(4) (2002).

[30] MO. REV. STAT. § 135.225.1 (2000).

[31] OHIO REV. CODE ANN. §§ 5709.62(c)(1)-(3) (West 1999).

[32] ORE. REV. STAT. §§ 285B.698(1)-(6) (1999).

[33] UTAH CODE ANN. § 9-2-413(1) (Lexis-Nexis Supp. 2002).

[34] IOWA CODE ANN. § 15.A9(4) (West Supp. 2002).

provides a personal property tax credit only for those "practicing dentistry in a geographic area of the State that has been designated by the Secretary of Health and Mental Hygiene as being underserved by dentists."[35]

The Maryland dentistry credit and the various States' enterprise zone credits are tax differentials that invoke geographic criteria of the same sort the Iowa Supreme Court attacks. After the allowed credits are taken into account, "the same activity is being taxed at significantly different rates" based on "a mere difference in location." Pet. App. 8. Manufacturing widgets inside or outside the enterprise zone may be "equally important in terms of revenue production." Pet. App. 9. Yet the States differentiate between the manufacturing plant on one block and the one on the next, just outside the zone. Similarly, dentists throughout Maryland providing the same services using the same equipment pay a single tax rate – unless eligible, by virtue of location, for a tax credit enacted as a means of promoting the practice of dentistry where it is most needed.

III. To preserve the States' ability to tailor their tax systems to garner adequate revenues and to promote economic development in the areas of greatest need, this Court should rein in judicial efforts to extend the courts' involvement into setting the precise boundary between two areas subject to different tax rates or eligible for different tax credits.

It will seldom, if ever, be possible to justify, under the Iowa approach, the placement of the boundary of an "enterprise zone" on 1st Street, instead of 2nd, or the authorization of a tax

[35] MD. CODE ANN. TAX-PROP. § 9-237.

in the geographic area to the west of Main Street, and not to the east, or denying a tax credit to one dentist while granting it to another just down the street. Yet legislatures have drawn such lines since before the beginning of the Republic – without judicial interference of the kind we see in this case.

As the petitioner points out, the federal concept of equal protection has never been equated with the requirement that the states yield "'to an iron rule of equal taxation.'"[36] Near the end of the 19th Century, this Court observed in *Bell's Gap Railroad Co. v. Commonwealth of Pennsylvania* that if the Fourteenth Amendment were to impose such an iron rule, the rule "would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."[37] Near the end of the 20th Century, the Court observed in summary that "[n]o scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact."[38] At the beginning of the 21st Century, the same rule should apply.

Courts still lack – as this Court has noted in *Madden v. Kentucky* – the familiarity of a legislature with local conditions

[36] Brief for Petitioner, p. 24 n.1, *quoting Bell's Gap R.R. Co. v. Commonwealth of Pennsylvania*, 134 U.S. 232, 235 (1890).

[37] *Bell's Gap R.R.*, 134 U.S. at 237.

[38] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-41 (1973).

that impact the setting of tax rates.[39] Thus, this Court, and others, have historically afforded state legislatures great deference in setting taxes.[40] Indeed, this Court has "often admonished against" judicial interference in the states' fiscal policies under the Equal Protection Clause.[41]

The judiciaries of the states do not, at present, follow the Iowa approach. They generally defer to legislative classifications in the tax context, in the face of equal protection challenges.[42] The Idaho Supreme Court aptly summarized the prevailing rule: "The fit need not be perfect, and the legislative scheme 'does not offend the constitution simply because it is

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[39] *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940).

[40] *Id.*

[41] *San Antonio Indep. Sch. Dist.*, 411 U.S. at 40-41.

[42] E.g., *John Hancock Mut. Life Ins. Co. v. Comm'r of Revenue*, 497 N.W.2d 250, 253 (Minn. 1993); *Communications & Cable of Chicago, Inc. v. City of Chicago*, 668 N.E.2d 1032, 1041 (Ill. Ct. App. 1996); *City of Prattville v. Welch*, 681 So. 2d 1050, 1053 (Ala. 1996); *Howard v. City of Fort Smith*, 845 S.W.2d 497, 499 (Ark. 1993); *Tucson Newspapers Inc. v. City of Tucson*, 837 P.2d 180, 186 (Ariz. Ct. App. 1992); *Eastern Air Lines, Inc. v. Dep't of Revenue*, 455 So.2d 311, 314 (Fla. 1984); *Sheppard v. State*, 650 P.2d 643, 646 (Idaho 1982); *Wesley Medical Center v. McCain*, 597 P.2d 1088 (Kan. 1979); *Michael J. Maloof & Co. v. Bureau of Revenue*, 458 P.2d 89 (N.M. 1969); *Oil Heat Institute of Washington v. Town of Mukilteo*, 498 P.2d 864 (Wash. 1972).

not made with mathematical nicety or because in practice it results in some inequality.'"[43]

The radical departure from the historical approach that the Iowa decision advances is particularly worrisome given the complex problems the states' legislatures are facing today. The cost of maintaining state and local government has increased almost every year of this country's existence.[44] But today, nearly every state is facing a fiscal crisis.[45] Permitting courts to second-guess legislative decision making in the tax context in the fashion endorsed by the Iowa Supreme Court would place the States on the path to fiscal chaos.

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[43] *Sheppard v. State*, 650 P.2d at 648, *quoting School Dist. No. 25 v. State Tax Comm'n*, 612 P.2d 126, 131 (Idaho 1980).

[44] James M. Dailey, *Casenote and Comment: The Thin Line Between Acceptable Disparate Tax Treatment of Nonresidents and Unconstitutional Discrimination Under the Article IV Privileges and Immunities Clause*, 21 HAMLINE L. REV. 563, 577 (Spring 1998).

[45] *See* note 1 and accompanying text, *supra*.

CONCLUSION

For the reasons stated above, the decision of the Iowa Supreme Court should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

MICHAEL FITZGERALD,
Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD. and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Institute for Justice (IJ) is a nonprofit, public interest law firm that litigates in support of greater judicial protection of fundamental individual rights. Among those rights is economic liberty, the freedom of individuals to earn an honest living in the business or occupation of their choosing without excessive or arbitrary government interference. IJ challenges regulatory barriers to enterprise under a number of federal and state constitutional provisions, including the equal protection clause of the 14th Amendment. Because this case presents the question of the proper application of this Court's "rational basis" scrutiny under the equal protection clause, it directly affects IJ's mission and clients.

The parties in the case have consented to the filing of this amicus brief.[1]

SUMMARY OF ARGUMENT

Governmental enactments that draw lines among classes of individuals are as dangerous as they are common. In many instances, such line-drawing is benign and public-spirited. In other instances, however, the government's power to differentiate among classes in the assignment of rights or burdens is invoked by the politically

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

powerful to the detriment of the less-powerful. In such instances, judicial intervention is the only recourse.

The framers were extremely concerned about the abuse of government's power to classify and discriminate in service of what they called the "evil of faction." In the original Constitution and in subsequent amendments, a number of mechanisms were crafted to safeguard against such abuse, foremost among them the equal protection guarantee enforced through judicial review. In countless instances the courts have acted to negate governmental abuses, particularly in those categories in which the courts have applied strict scrutiny. But in areas in which the courts have applied only rational basis review, the results are uneven. Too often precious liberties are sacrificed not to legitimate governmental means and ends, but to nefarious special-interest designs effectuated through the coercive power of government. To fulfil the vital role assigned to it as a check against legislative excesses, the Court should take this opportunity to harmonize its inconsistent rational basis jurisprudence and to exercise a meaningful review of legislation that allocates unequal burdens and benefits. Far from constituting judicial activism, it is essential for this Court to assume such a role to enforce the system of checks and balances intended by the framers – and thereby to protect vital individual liberties.

ARGUMENT

I. THE COURT SHOULD APPLY MEANINGFUL RATIONAL BASIS REVIEW TO CLASSIFICATIONS DRAWN BY GOVERNMENT AMONG INDIVIDUALS.

A. In creating a national republic, few concerns animated the framers of our Constitution more than the propensity among self-interested groups of individuals to manipulate the power of government for their own ends. As James Madison argued, "Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." Madison, *The Federalist* No. 10 (Modern Library College ed.) at 53. By faction, Madison meant what is considered today a special-interest group: "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 54. "The latent causes of faction are . . . sown in the nature of man," Madison explained. *Id.* at 55.

In a republic, factions are motivated to achieve their ends through legislative action. Madison had little faith in the legislature's ability consistently to resist such entreaties:

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial

> determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? . . . It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good.

Id. at 56-57. Indeed, Madison warned that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex," and therefore it is "against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." *The Federalist* No. 48 at 322-23.

Because faction is inherent in human nature, and efforts to restrain such passions would impair liberty, Madison concluded "that the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*." *The Federalist* No. 10 at 57 (emphasis in original). "To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and form of popular government, is then the great object to which our inquiries are directed." *Id.* at 57-58.

The framers' solution was to create mechanisms aimed at checking the power of majorities, thereby rendering them "unable to concert and carry into effect their schemes of oppression." *Id.* at 58. Indeed, "controlling the ability of interest groups" to secure outcomes adverse to the general interest "was a primary goal of the new Constitution," which "establishes a multitude of mechanisms to deter the efficacy of interest groups." Macey, "Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model," 86 *Colum. L. Rev.* 223,

243 & 249 (1986). Structurally, those mechanisms include the separation and balance of powers, federalism, the express limitation on the powers of government, and the express reservation of individual rights. Substantively, they include the commerce, privileges and immunities, and contracts clauses of the original Constitution; and the privileges or immunities, due process, and equal protection guarantees of the 14th Amendment. As Professor Cass Sunstein has noted, those provisions are "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Sunstein, "Naked Preferences and the Constitution," 84 *Colum. L. Rev.* 1689, 1689 (1984).

The equal protection clause was added to the Constitution precisely in response to such an abuse of power: the enactment by southern legislatures of the notorious Black Codes following the Civil War, which deprived newly emancipated blacks of their economic liberties. See Bolick, *Unfinished Business* (1990) at 54-57. The clause, of course, speaks in sweeping and universal terms, providing that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Sen. Jacob Howard, one of the amendment's lead sponsors, explained that the intent of the equal protection clause was to "abolish all class legislation and do away with the injustice of subjecting one caste of persons to a code not applicable to another." *Cong. Globe*, 39th Cong., 1st Sess., 1866, S. p. 2765. Another key proponent, Sen. Thaddeus Stevens, proclaimed that henceforth "no distinction would be tolerated in this purified Republic but what arose from merit or conduct." *Id.* at 65.

But such guarantees would be illusory without meaningful judicial review, a fact not lost upon the framers. As Alexander Hamilton argued, an independent judiciary provides an "excellent barrier to the encroachment and oppressions of the representative body." *The Federalist* No. 78 at 503. The specific restraints on the power of government and guarantees of individual rights, Hamilton urged, "can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *Id.* at 505.

Specifically, "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments," *id.* at 508, most notably in the "injury of the private rights of particular classes of citizens, by unjust and partial laws." Hamilton explained,

> Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.

Id. at 509. In other words, meaningful judicial review of legislative line-drawing is essential not only to check excesses of the legislative branches and to safeguard individual rights, but to instill a sense of self-discipline in

the legislative branches to abide their own constitutional limits. In this way, vigorous judicial action will lead to a diminishing necessity for such review. By contrast, as Madison would predict, judicial abdication no doubt would unleash the natural propensity of government to exceed its constitutional boundaries.

Plainly, the framers of the original Constitution and the 14th Amendment intended to constrain the power of government to classify and discriminate among classes of individuals – not merely in matters of race, but with regard to vital everyday concerns such as freedom of enterprise, property ownership, and the like. Just as plainly, the framers understood that the judiciary's role in such regard must be central. At the same time, they understood the importance in a republic of judicial deference to legitimate democratic prerogatives. The design is one of delicate balance. But surely that balance is thrown off, not secured, through judicial abdication.

B. All parties to this case agree that the proper scrutiny of the legislative line-drawing at issue in this case – grossly unequal taxation of similar enterprises – is rational basis. The question this Court must answer is: which rational basis test? For though it rarely acknowledges it, the Court has applied not one rational basis test but two, thereby sowing uncertainty and confusion.

In a predominance of rational basis cases, this Court has exercised extreme deference that virtually eviscerates judicial review. Under that version of the test, the term rational basis is a misnomer, for it requires that the explanation be neither "rational" nor the "basis" for the governmental enactment. But under another set of precedents, the Court has applied meaningful rational basis

review, according substantial deference to democratic decisionmaking but not acting as a mere rubber stamp to legislative line-drawing. The esteemed late constitutional scholar Gerald Gunther characterized such review as "rational basis with bite," see Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection," 86 *Harv. L. Rev.* 1 (1972); another scholar refers to it as "measured reasonableness." Bilionis, "The New Scrutiny," 51 *Emory L. J.* 481, 513 (1992). "Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends." Gunther, 86 *Harv. L. Rev.* at 20. It is that form of meaningful rational basis review that the Iowa Supreme Court below attempted to apply, and it is the form of rational basis review that accords with original intent with respect to equal protection.

Under the most deferential rational basis review, legislation that deals with non-fundamental rights is upheld against equal protection challenge if it has "a reasonable relation to a proper legislative purpose."[2] *Nebbia v. New*

[2] This Court has recognized that the opportunity to pursue a means of livelihood is a fundamental right and one of the privileges and immunities of American citizenship. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279-81 & n.10 (1985); *United Bldg. & Constr. Trades Council v. Mayor and Council of City of Camden*, 465 U.S. 208, 219 (1984). Indeed, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity" that the Constitution was designed to protect. *Truax v. Raich*, 239 U.S. 33, 41 (1915); accord, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-03 (1976). It is anomalous, then, that the Court applies the most lenient possible standard of review in assessing state action that impairs economic liberty.

York, 291 U.S. 502, 537 (1934). Deferential enough on its face, it is even less robust in operation. See *U.S. v. Carolene Products*, 304 U.S. 144, 154 (1938). The Court has placed upon the plaintiff the burden to "negative every conceivable basis which might support" the legislation. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). The legislature is under no obligation to "actually articulate at any time the purpose or rationale" for the law or to provide evidence in support of the rationale. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Legislative decisions may be "illogical" and "unscientific," *Heller*, 509 U.S. at 321, and are sustainable even if they are "probably not true" or "not be true at all." *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991). Such a hyper-relaxed standard of review does not at all reflect the careful judicial review of legislative line-drawing envisioned by the framers, and in fact has created an "equal protection free zone" for most species of legislative action. Saphire, "Equal Protection, Rational Basis Review, and the Impact of *Cleburne Living Center, Inc.*," 88 *Ky. L. J.* 591, 608 (1999-2000). Indeed, as Prof. Bernard Siegan has observed, it would take a legislature "in a complete state of lunacy" to flunk this version of rational basis review. Siegan, *Economic Liberties and the Constitution* (1980) at 121. As Justice Stevens has observed, this relaxed standard is "tantamount to no review at all." *FCC v. Beach Communications*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).

But in another line of cases, the Court has charted a still-deferential yet meaningful rational basis review. The argument for this standard was perhaps best summarized by Justice Jackson in his concurring opinion in *Railway Express Agency v. New York*, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring):

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Thus understood, the rationality requirement is "a requirement that regulatory measures be something other than a response to public pressure." Sunstein, "Interest Groups in American Public Law," 38 *Stanford L. Rev.* 29, 49 (1985).

Meaningful equal protection rational basis review traces back to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), decided decades before the Court announced the dichotomy between fundamental and non-fundamental rights in *Carolene Products*, *supra*. In *Yick Wo*, the Court analyzed a seemingly innocuous San Francisco ordinance that required laundries to be constructed of brick. But the law was procured by certain laundry owners to the economic detriment of other (primarily Chinese) establishments.

Declared the Court, "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is . . . within the prohibition of the Constitution." *Id.* at 373-74.

More recently, the Court in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court applied rational basis review to unanimously strike down an ordinance that singled out homes for the mentally retarded for a requirement of obtaining a special use permit. Although acknowledging that "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes," the Court declared that the equal protection clause is "essentially a direction that all persons similarly situated should be treated alike." *Id.* at 439-440; see also *id.* at 452 (Stevens, J., concurring) ("the word rational – for me at least – includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially"). The standard the Court applied required a showing that the group singled out for adverse treatment possesses "distinguishing characteristics" that justify a "distinctive legislative response," *id.* at 443 (opinion of the Court), and that the law actually is "based on [that] distinction." *Id.* at 449.

In implementing this equal protection standard, the Court scrutinized the law from multiple perspectives. First, it found that "the record does not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests." *Id.* at 448. Second, it concluded that "mere negative attitudes, or fear,

unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" for differential treatment. *Id.* Third, any bases for differentiation must actually be tailored to the "special hazard" to an extent that justifies denying to some individuals what is available to others. *Id.* at 449; see also *id.* at 452 n.4 (Stevens, J., concurring) ("'I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature'") (citation omitted).

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court struck down on rational basis grounds a zoning law limiting occupancy of dwelling units to members of a nuclear family.[3] Writing for the plurality, Justice Powell declared that the Court "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499 (plurality). Justice Powell acknowledged that the city's concerns about congestion, overcrowding, and the burden on city services were "legitimate," but concluded that the ordinance was invalid because it served the city's objectives "marginally at best." *Id.* at 500.

In *Romer v. Evans*, 517 U.S. 620 (1996), the Court invalidated a Colorado initiative that forbade municipalities from enacting anti-discrimination laws to protect homosexuals. Equal protection was triggered, the Court

[3] The case was decided under the due process clause, which encompasses the same rational basis test, but could have been decided under equal protection given the lines drawn between groups of individuals.

ruled, because homosexuals, "by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres." *Id.* at 627. The Court described the applicable standard:

> [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. . . . [But] [b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Id. at 632-633. This standard articulates precisely the careful balance contemplated by the framers.[4]

[4] The Court in *Romer*, *id.* at 632-33, distinguished decisions that sustained regulations under the rational basis test by noting that "[t]he laws challenged in the cases just cited were narrow enough in scope and *grounded in a sufficient factual context* for us to ascertain some relation between the classification and the purpose it served" (emphasis added). That suggests that the Court always will insist upon some sort of factual record to sustain a finding of rational basis.

In *Romer*, the law evoked judicial skepticism because it "singl[ed] out a certain class of citizens for disfavored legal status or general hardships," which effects "a denial of equal protection of the laws in the most literal sense." *Id.* at 633. In applying the standard, the Court found that with regard to the government's alleged interests, the law was "at once too narrow and too broad," *id.*; and indeed the "breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." *Id.* at 635. Accord, *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992) (justification not credited where "the facts precluded any plausible inference" to sustain it).

The cases applying meaningful rational basis scrutiny consistent with the framers' intent yield at least five judicially manageable principles:

1. The courts should defer to legitimate democratic judgments. "The avoidance of ultimate value judgments about the legitimacy and importance of legislative purposes [should] make the means-focused technique a preferred constitutional ground for a less interventionist Court." Gunther, 86 *Harv. L. Rev.* at 21-22.

2. However, where government singles out discrete groups of individuals for special burdens or benefits, the courts should view such classifications with skepticism, and insist upon record evidence showing a legitimate governmental interest and that the means employed are rationally related to that interest. Such review would "ensure that disparate treatment is justified by reference to something other than an exercise of political power by those benefitted – or, to state the matter positively, to ensure that representatives have exercised some sort of judgment instead

of responding mechanically to interest-group pressures." Sunstein, "Interest Groups in American Public Law," 38 *Stanford L. Rev.* 29, 69 (1985). Courts should "gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing." *Gunther*, 86 *Harv. L. Rev.* at 21.

3. Some governmental interests are illegitimate. See, e.g., *Cleburne*, 473 U.S. at 450 (giving effect to "irrational prejudice"); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("economic protectionism" is not a legitimate governmental objective).

4. The record must disclose some special threat posed by the disadvantaged group that merits a distinctive legislative response. See *Cleburne*, *supra*.

5. Classifications that are overbroad or underinclusive suggest that the reasons advanced for the classification are pretextual. See *Yick Wo* and *Romer*, *supra*.

Those standards, derived from the original understanding of equal protection and from this Court's decisions in *Yick Wo*, *Cleburne*, *Moore*, and *Romer*, would safeguard the rights and opportunities of discrete groups of individuals against discriminatory state legislation adopted for protectionistic ends. They form a balanced and workable rational basis framework by which the courts should assess all instances of government-drawn classifications that assign different benefits and burdens to different classes of individuals.

C. This Court has articulated multiple rationales for a highly deferential rational basis test. It presumes that legislative errors are the result of, and generally are correctable through, democratic processes. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 97 (1979). It assumes that legislatures are more competent to determine where lines among classes of citizens should be drawn than are courts. See, e.g., *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). And it presumes that any more exacting standard would be judicially unmanageable. See, e.g., *FCC v. Beach Communications*, *supra*, 508 U.S. at 314. Whether those presumptions are correct or not, none justifies a standard of review so lax that it sanctions unfettered legislative power to discriminate among classes of individuals for arbitrary, irrational, or nefarious purposes.[5]

The first premise – deference to democratic processes – is inapt, because it was precisely the abuse of normal democratic processes, through their manipulation by special interests, that the framers sought to prevent. Democratic processes are inherently susceptible to what the framers referred to as the "passions" of factions, whose intensity of interest can override majority will or the interests of the public as a whole. The ultimate safeguard

[5] Indeed, even some of the most deferential decisions recognize that judicial intervention is warranted where "the varying treatment of different groups or persons is so unrelated to the achievement of . . . legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance*, 440 U.S. at 97; see also *Heller*, 509 U.S. at 321 ("even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation").

against such abuse is limited judicial review, which by demanding some semblance of "fit" between legitimate ends and means can ferret out self-interested from public-spirited legislative line-drawing.

In practical reality, it can be argued that "[t]he preferences of the 'majority' are virtually irrelevant in determining legislative outcomes. Instead, law is made by legislators whose primary goal is to aggregate the political support they receive from competing special interest group coalitions." Macey, "Public Choice: The Theory of the Firm and the Theory of Market Exchange," 74 *Cornell L. Rev.* 43, 60 (1988). What is even more clear is that the degree of judicial scrutiny is central in determining the extent to which special-interest groups will be able to manipulate legislative processes to their own ends:

> Where techniques of statutory construction raise the probability that certain interest group oriented statutes will be invalidated by courts, . . . the value of – and hence the demand for – special interest legislation declines. Similarly, of course, as the probability that a statute will be invalidated as unconstitutional goes up, the willingness of interest groups to pay for it goes down. As judicial deference to legislatures goes up, as it has in recent years, one would expect the demand for legislation by interest groups to rise as well.

Id. at 57. When the pendulum shifts too far in favor of judicial deference, the result is to unleash special-interest

domination of democratic processes in precisely the ways the framers feared.[6]

Moreover, even if the premise of democratic correctability was true at one time, it is not today. Governments at every level have proliferated in number and scope to such an extent that one commentator has observed that America is now the "most 'governed' state in the world." Anton, *American Federalism and Public Policy* (1989) at 4. Many governing bodies that touch the lives of every American – from zoning boards to boards of education to regulatory agencies – are often appointed, virtually invisible, and largely unaccountable through direct democratic processes. To hold that a citizen aggrieved by discrimination at the hands of such agencies is limited to recourse through democratic processes is, in most instances, to hold that no real remedy exists at all.

The second and third premises – judicial incompetence and unmanageability – also are faulty. A more rigorous rational basis review does not call upon the courts to perform the legislative function of choosing among competing policy alternatives. Rather, it calls upon the courts to perform the most basic and essential judicial function: reviewing governmental impositions that discriminate among classes of individuals to determine

[6] That phenomenon has led to corrective efforts to restrain campaign spending and contributions. Madison viewed efforts to restrain the liberty of factions as incompatible with a free society, preferring institutional restraints that would prevent factions from manipulating government power for their own ends. See *The Federalist* No. 10 at 54-55. But to the extent that courts abdicate their essential role in enforcing those institutional restraints, it will increase the demand for after-the-fact corrective mechanisms.

whether the legislature has exceeded its constitutional boundaries.[7] Though in an ideal world the legislatures would limit themselves, in reality the natural temptation is to appease special interest pressures and test the outermost boundaries of proper legislative power. The framers understood and forecast precisely that impulse, they recognized that it would manifest itself most injuriously in class legislation sought not for the public good but for private gain, and they assigned to the judiciary the role of policing abuses and safeguarding individual rights. Fulfilling that role is not judicial activism; abdicating it is.

Indeed, the courts perform precisely that function in other jurisprudential contexts. Courts frequently are called upon to define the scope of the police power, and to delimit its exercise. In determining whether a legislative enactment is encompassed within the police power, the Court insists upon "substantial evidence." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). In cases under the dormant commerce clause raising claims of discriminatory burdens, the courts balance the asserted interests of the state against the impact on interstate

[7] Even Judge J. Skelly Wright, an advocate of "judicial retreat" from review of administrative decisionmaking (see Wright, "Judicial Review and the Equal Protection Clause," 15 *Harv. Civ. Rts. – Civil Liberties L. Rev.* 1, 4 (1980)), argued that "the principle of equality before the law is peculiarly appropriate for judicial implementation." Noting that the motto " 'equal justice under law' was chiseled into the facade of the present Supreme Court building," Skelly observed that democratic processes are not calculated to achieve the equal treatment required by law. "To decide whether official action accords equal treatment is a task especially congenial to the judicial temperament. And, because it comes naturally and involves few basic policy choices, judges tend to perform the function well." *Id.* at 19.

commerce. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The courts likewise conduct a means/ends analysis with regard to congressional power under the commerce clause. See, e.g., *U.S. v. Lopez*, 514 U.S. 549 (1995). In cases involving alleged regulatory takings, the courts determine whether a "rough proportionality" exists between the costs occasioned by a proposed development and the regulatory burdens sought to be imposed by government. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994). All of those judicial inquiries are similar to the equal protection analysis applied by this Court in *Yick Wo*, *Cleburne*, *Moore*, and *Romer*. The standard is at once appropriately deferential to democratic prerogatives, yet at the same time appropriately robust in the protection of individual liberties.

All agree that rational basis is the correct test to review legislative classifications that benefit one group and disadvantage another. The only question is whether it is a true rational basis test, in which the Court insists at least upon both a reason and a basis, or a mere rubber stamp. In reviewing the decision below, this Court should apply meaningful rational basis review, rather than allow the legislature *carte blanche* authority to discriminate among enterprises in the imposition of taxes without any real limits or constitutional accountability.[8] In the enjoyment of their

[8] Such a meaningful inquiry accords with a long line of cases striking down discriminatory taxation on equal protection grounds. See *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Phillips Chemical Corp. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960); *Williams v. Vt.*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985);

(Continued on following page)

most basic rights, Americans cannot feel secure absent the constant vigilance of the courts.

II. IF THE COURT DISAGREES WITH THE IOWA SUPREME COURT, IT SHOULD REMAND THE CASE FOR INDEPENDENT REVIEW UNDER THE IOWA CONSTITUTION.

The Iowa Supreme Court based its determination on both federal and state equal protection grounds, relying heavily on precedents from Iowa[9] and other states. It is a cornerstone of our federalist system that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995). The Iowa Supreme Court concluded that the equal protection guarantees of the state and federal constitutions were coextensive. Should this Court diverge from the Iowa Supreme Court's articulation of federal equal protection standards or their application to the facts of this case, the Court should, as a matter of judicial comity and respect for federalism, remand the case to the Iowa Supreme Court to consider the case under state equal protection principles. This Court should not assume that the highest court of a state would automatically accede to a narrower construction of equal protection guarantees in its own constitution merely

Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336 (1989).

[9] See, e.g., *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980); *Gleason v. City of Davenport*, 275 N.W.2d 431 (Iowa 1979).

because a similar provision in the federal constitution is narrowly construed.

CONCLUSION

Because the Iowa Supreme Court's application of both federal and state equal protection principles are in accord with the intent of the framers of our federal Constitution, the proper course of action is to affirm the decision below.

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In The

Supreme Court of the United States

MICHAEL FITZGERALD, Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD. and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF OF THE CITY OF DUBUQUE, IOWA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The City of Dubuque, Iowa (Dubuque) is an Iowa municipal corporation. Dubuque owns the greyhound racetrack that is leased to Respondent Dubuque Racing Association, Ltd. (DRA), a non-profit corporation. DRA operates slot machines at the racetrack. Pursuant to the lease, and as required by Iowa Code § 99F.6(4)(a), at the end of its fiscal year, DRA is required to distribute fifty percent (50%) of its net cash proceeds to Dubuque and twenty-five percent (25%) of its net cash proceeds to charity. The lease requires that Dubuque deposit the annual distribution in its capital improvement fund.

The greyhound racetrack employs several hundred employees and is a major tourist attraction for Dubuque.

For the last five years, the DRA distribution to Dubuque and to charities has been as follows:

	Dubuque	Charities
2002	$ 5,136,000	$ 2,568,000
2001	7,542,748	2,179,000
2000	8,119,962	2,558,000
1999	7,278,981	2,198,000
1998	6,165,038	1,855,000

Capital improvement projects that have been funded by the DRA distributions to Dubuque include the following:

Civic center restoration	$ 1,456,840
Main Street reconstruction	1,002,273
Park maintenance and improvements	1,593,523
Industrial park development	8,313,939
Airport improvements	380,460
Riverfront development Including construction of education and convention center	9,069,501

Public swimming pool improvements	754,047
Other improvements	13,066,840
Including improvements to public library, city garage replacement, fire station elevator	
Total capital improvement projects funded by DRA distribution to Dubuque	$ 30,762,359

The thirty-six percent (36%) tax on slot machines at racetracks that is the subject of this proceeding would have a substantial impact on DRA's net cash proceeds and in turn on the annual distribution to Dubuque and charities. It is projected that the difference over the next five years between the thirty-six (36%) tax rate and the twenty percent (20%) rate that was the result of the Iowa Supreme Court ruling holding the thirty-six percent (36%) rate unconstitutional will result in the reduction of DRA distributions to Dubuque and charities of $30,143,232.

It is anticipated by DRA officials that at some point, the increased tax on slot machines will result in the closing of the greyhound racetrack, and the subsequent loss of employment, distributions to Dubuque and local charities, and tourism to Dubuque.

ARGUMENT

In this proceeding, Iowa racetracks challenge legislation that significantly increased the tax on racetracks, but not on riverboats. The riverboats are taxed at the rate of five percent (5%) on the first one million dollars of adjusted gross receipts, at the rate of ten percent (10%) on the next two million dollars of adjusted gross receipts, and at the rate of twenty percent (20%) on any amount of adjusted gross

receipts over three million dollars. The tax rate for racetracks is considerably higher than for riverboats. Beginning on January 1, 1997, the legislature set a rate of twenty-two percent (22%) on adjusted gross receipts over three million dollars from gambling games at racetracks. This rate was set to increase by two percent (2%) each calendar year until the rate reaches thirty-six percent (36%). *Racing Ass'n of Cent. Iowa*, 648 N.W.2d 555, 557 (Iowa 2002).

The Iowa District Court upheld the unequal taxing scheme. The Iowa Supreme Court, finding no rational basis existed for this differential tax treatment, held that the tax violates the federal and state equal protection clauses. *Racing Ass'n of Cent. Iowa*, 648 N.W.2d 555, 562 (Iowa 2002).

Under Iowa Code § 99F.11, a tax is imposed on the adjusted "gross receipts received annually from gambling" games authorized under this chapter at the rate of five percent (5%) on the first one million dollars of adjusted gross receipts, at the rate of ten percent (10%) on the next two million dollars of adjusted gross receipts, and at the rate of twenty percent (20%) on any amount of adjusted gross receipts over three million dollars. However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games "at racetrack enclosures" is twenty-two percent (22%) and shall increase by two percent (2%) each succeeding calendar year until the rate is thirty-six percent (36%).

Racetracks are only permitted to operate slot machines, not other games of chance or video machines. Iowa Code § 99F.1(9). The effect of Iowa Code § 99F.11 is to tax gross receipts from racetrack slot machines at thirty-six percent (36%), while taxing gross receipts from slot machines on riverboats at twenty percent (20%).

The Iowa Supreme Court correctly concluded that "We cannot justify this tax based on the fact racetracks operate on land whereas riverboats operate on water." *Racing Ass'n of Cent. Iowa*, 648 N.W.2d 555, 562 (Iowa 2002).

As argued by the Respondents, there can be no rational basis for the discriminatory tax because, "There is no rational reason for the same revenues from the same machine used in the same way to be taxed at an 80 percent higher rate because of the machine's location." Respondents' Brief in Opposition, p. 13.

Although it may be permissible to treat "the operations of a particular kind of business" one way and treat "some other kind of business closely akin thereto" differently, see *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937), this is not a case where slot machines at racetracks are "closely akin" to slot machines on riverboats. It is the *same* business that is being treated differently. The "thing taxed," see *Flint v. Stone Tracy Co.*, 220 U.S. 107, 161 (1911) is, in either instance, gross receipts from slot machines. The only difference between the "thing taxed" is the location of the slot machines.

As the Iowa Supreme Court correctly observed:

> The State contends riverboats and racetracks are different classes simply because one is land-based whereas the other floats on water. At first blush, this is an appealing argument. However, in reality the essence of the differential treatment is not rooted in the dissimilar scenery surrounding the main activity at both facilities. Rather, the heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. *That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. Where the same activity is being taxed at significantly different rates, a mere difference in location is not sufficient to uphold the discriminatory tax.* (Emphasis added)

Racing Ass'n of Cent. Iowa, 648 N.W.2d 555, 559 (Iowa 2002).

With respect to the tax on gross receipts from these two taxpayers – racetracks and riverboats – there is "so much similarity between them that they must be placed in precisely the same classification for tax purposes." The difference in treatment of these taxpayers is *per se* prohibited discrimination. "Varying taxes" cannot be "laid upon taxpayers engaged in precisely the same form of activity." Equal protection does not require identity of treatment, but it does require "that classification rest on real and not feigned differences." See *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 236-37 (1954). Here, there are no "real differences;" the "thing taxed" is the same.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Iowa should be affirmed.

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In The
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MICHAEL FITZGERALD, Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD. and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF OF POLK COUNTY, IOWA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

As Amicus Curiae,[1] Polk County, Iowa ("Polk County") has a special interest in supporting Respondents, particularly Respondent Racing Association of Central Iowa, operator of Prairie Meadows Racetrack and Casino. Polk County is a political subdivision of the State of Iowa and is uniquely qualified to bring to the attention of the Court relevant matter not already brought to its attention by the parties which Polk County believes may be of considerable help to the Court.[2] Supreme Court Rule 37.1.

Polk County has been involved in legalized gaming since the Iowa General Assembly adopted the Iowa Pari-Mutuel Waging Act, Iowa Code Chapter 99D, in 1983. In 1984, the Polk County Board of Supervisors issued $40 million in revenue bonds to finance the construction of a racetrack in Altoona, Iowa. In 1986, Respondent Racing Association of Central Iowa was organized as a non-profit entity to build and operate the facility. Prairie Meadows Racetrack opened as a pari-mutuel horse racing facility in March 1989. During the initial years of operation, the enterprise encountered financial difficulties, resulting in Chapter 11 filing in November 1991. As part of the plan for reorganization, Polk County took possession of the site, improvements and personal property. Respondent Racing

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[1] Pursuant Supreme Court Rules 37.4 and .6, no motion for leave to file this brief is required, as this brief is submitted on behalf of a county by its authorized law officer.

[2] Polk County is Iowa's largest county, with a population in the 2000 census of 374,601. Iowa's capital city, Des Moines, is located in Polk County, as is the city of Altoona, which is the site of Prairie Meadows Racetrack and Casino, operated by Respondent Racing Association of Central Iowa.

Association of Central of Iowa, as licensee under Iowa Code Chapter 99D, continued to operate the facility. In March 1994, the Iowa General Assembly amended Iowa Code Chapter 99F authorizing the use of slot machines at pari-mutuel facilities licensed prior to January 1, 1994. Iowa Code § 99F.4A. Through utilization of Polk County funds, slot machines were purchased and installed at Prairie Meadows and the casino portion of the facility was opened to the public in April 1995. To the present day, Polk County has maintained its ownership interest in the land and improvements at Prairie Meadows Racetrack and Casino.

From 1995 through 1997, Polk County and the Racing Association of Central Iowa were parties to an operating agreement that essentially provided Polk County with all net receipts after payment of operating expenses, including state gaming taxes. From 1998 through 2002, Polk County and the Racing Association of Central Iowa were parties to a lease agreement that provided payment to the County of a monthly rent plus payment of a fixed sum from net receipts as determined after payment of reasonable expenses, including the state gaming tax authorized by Iowa Code § 99F.11. These distributions from net receipts are authorized by statute which requires licensees to distribute any net income not used to retire debt or supplement horse or dog purses for educational, civic, public, charitable, patriotic or religious uses. Iowa Code § 99F.6(4)(a). Such uses include "erecting and maintaining public buildings or works, or otherwise lessening the burden of government . . . ." Iowa Code § 99B.7(3)(b). From

1994 through 2002, Respondent Racing Association of Central Iowa has dedicated and distributed over $186 million to Polk County.[3]

By 2002, the escalating state gaming tax on revenues from slot machines at Iowa racetracks, authorized by Iowa Code § 99F.11, had significantly impeded the ability of Respondent Racing Association of Central Iowa to dedicate and distribute its net receipts to Polk County and the charities it supports. If the Court does not uphold the ruling of the Iowa Supreme Court, Polk County will not receive the final one million dollars Respondent had dedicated for distribution in 2002.

Polk County and the Racing Association of Central Iowa are presently parties to a lease agreement that runs through December 2010. As before, Polk County receives a monthly rent, plus a fixed sum from net receipts as determined after payment of expenses, including state gaming tax. Pursuant to this agreement, Polk County will also receive fifty percent of the lump sum recovery awarded by the Iowa Supreme Court to Racing Association of Central

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[3] In addition to retirement of all debt related to facility construction ($65.5 million), direct Polk County use (and indirect tax relief to Polk County taxpayers) includes retirement of other County indebtedness, e.g., sewer and drainage projects ($22.5 million), construction of an adult jail annex ($8.3 million), construction of a juvenile detention facility ($9.6 million), construction of two neighborhood senior centers ($3.9 million), purchase of new computer systems for County government ($10 million) and County road improvements ($3.5 million). County financial participation in multi-government and economic development projects include construction of a metropolitan highway by-pass with the State of Iowa Department of Transportation ($18 million) and construction of a downtown Des Moines parking garage ($10 million).

Iowa. Further, if the gaming tax laws should be amended to reduce the gaming taxes payable by Racing Association of Central Iowa, and its net receipts thereupon improve accordingly, they shall pay Polk County one-third of any such improvement. Rather than providing Respondents a windfall, an affirmation by this Court of the decision below will directly benefit the government and taxpayers of Polk County.

Pursuant to an agreement between Polk County and the Vision Iowa Board,[4] a public instrumentality of the State of Iowa, Polk County is obligated to use essentially all funds received as rent and net receipts from Respondent Racing Association of Central Iowa, for the period January 1, 2003 through December 31, 2010, to construct and operate the Iowa Events Center, a $219 million arena and exhibition hall complex in downtown Des Moines.[5]

[4] Vision Iowa was established by the 2000 Iowa General Assembly and the Governor of Iowa to support community projects that build on Iowa's unique assets and values and expand the recreational, cultural, educational and entertainments in Iowa. Iowa Code § 15F.101 et seq. Petitioner Michael Fitzgerald, Treasurer, State of Iowa, is a member of the Vision Iowa Board. Iowa Code § 15F.102(2)(g).

[5] The Iowa Events Center is the focal point of an historic $340 million commitment by Polk County, the State of Iowa, the City of Des Moines, other Polk County municipalities and numerous private entities and persons to the Capital City Vision Project. In addition to constructing and operating a 16,000 seat arena and a 100,000 square foot exhibition hall, Polk County will also renovate and operate the existing Veterans Memorial Auditorium. Polk County is also contributing $5 million toward the construction of a new Des Moines Public Library, $5 million toward the construction of the World Food Prize Center, $3.5 million toward the construction of a new Science Center of Iowa and $1.5 million toward the construction of the John and Mary Pappajohn Learning Center. It is the plan of Polk County to fund all

(Continued on following page)

Polk County and its citizens are truly partners with and beneficiaries of Respondent Racing Association of Central Iowa and have a special interest in supporting Respondents. If the Court does not affirm the ruling of the Iowa Supreme Court, Respondent Racing Association of Central Iowa will find it extremely difficult, if not impossible, to continue its commitments to Polk County and its citizens, directly affecting the Capitol City Vision Project.

SUMMARY OF ARGUMENT

The issue before the Court is whether the Equal Protection Clause permits the State of Iowa to impose one tax rate on revenue from riverboat casinos, the overwhelming majority of which revenue comes from slot machines, and a higher tax rate on revenue from racetrack enclosures, essentially all of which revenue comes from slot machines. Amicus Curiae Polk County, Iowa urges the Court to uphold the decision of the Iowa Supreme Court in *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d 555 (2002), *cert. granted*, 123 S.Ct. 963 (Jan. 17, 2003) (No. 02-695), which found the Iowa tax rate on revenue from racetrack enclosures to be violative of equal protection rights under both the United States Constitution and the Iowa Constitution. The decision of the Iowa Supreme Court is in full accord and consistent with this Court's precedent concerning rational basis review of

these obligations from Prairie Meadows distributions and not increase its taxpayers' property tax rates.

equal protection challenges to state tax statutes, *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992); *Allegheny Pittsburgh Coal Company v. County Comm'n of Webster Cty.*, 488 U.S. 336 (1989).

ARGUMENT

The Decision of the Iowa Supreme Court Is in Full Accord and Consistent with this Court's Precedent.

The key to appreciating the analysis and conclusion of the Iowa Supreme Court lies in one sentence from its ruling: "In determining whether the tax statute is constitutional, we must consider whether the asserted purpose behind this tax could have been the genuine goal of the legislation." *Racing Association of Central Iowa*, 648 N.W.2d at 560, citing *Nordlinger*, 505 U.S. at 15-16. As this Court acknowledged in *Nordlinger*, there are cases "where the facts preclude any plausible inference" that the asserted purpose for a taxing scheme was the actual purpose. 505 U.S. at 16, citing *Allegheny Pittsburgh Coal Company*, 488 U.S. 336.

Without providing explicit attribution, the Iowa Supreme Court implicitly adopted a line of reasoning and conclusion totally consistent with the *Allegheny Pittsburgh* decision:

> Overriding this entire issue is the fact that the 1994 legislation was designed to save the racetracks and riverboats from financial distress.
>
> . . .

> The very same legislation designed to help the racetracks recover from economic distress also increased the tax on racetrack slots at a rate eighty percent higher than the tax imposed on riverboat slots. Though the state contends the stated purpose behind the racetracks is to encourage economic development and promote agriculture, this differential tax is contrary to such alleged intent.
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> Moreover, any stated benefit from the 1994 legislation is substantially jeopardized by the new tax rate imposed on the racetracks. We 'need not in equal protection cases accept at face value assertions of legislative purposes, when . . . the asserted purpose could not have been a goal of the legislation.'

Racing Association of Central Iowa, 648 N.W.2d at 560, citing, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n. 16.

In short, the gaming tax legislation fails the rational basis test because the goal advanced by the state, the differential tax rate between riverboats and racetrack enclosures, conflicts with the unquestioned legislative goal of economic development and promotion of agriculture. This is the analysis and conclusion authorized by this Court in *Allegheny Pittsburgh*, 488 U.S. at 345-6. The decision of the Iowa Supreme Court is in full accord and consistent with this Court's precedent.

CONCLUSION

Amicus Curiae Polk County, Iowa has a clear interest in supporting Respondent Racing Association of Central Iowa. For the reasons stated above, the decision of the Iowa Supreme Court should be upheld.

Respectfully submitted,

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